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SUPREME COURT OF FLORIDA

KEVIN O'NEILL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 86,869

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner was a defendant in the trial court and the appellant in the Fifth District Court of Appeal and the appellee was the state of Florida. The petitioner was prosecuted for two (2) counts of DUI manslaughter and five (5) counts of misdemeanor DUI. The parties will be referred to as the "petitioner," "defendant," "Kevin O'Neill," or "Kevin." The appellee will be referred to as "State" or "prosecution."

The following symbols will be used:

R. Record on appeal

Tr. Transcript of the trial

O. Opinion of the Fifth District Court of Appeal

The above will be followed by the citation of the page contained in either the record on appeal or the transcripts.

STATEMENT OF THE CASE

The case against the defendant, Kevin H. O'Neill, was a result of an automobile accident on May 31, 1992, in Satellite Beach, Brevard County, Florida. As a result of the automobile accident, Kevin was ultimately charged by information with two (2) counts of DUI manslaughter and five (5) counts of misdemeanor DUI.

Kevin accepted the consequences and withdrew his previously entered written plea of not guilty and entered a plea of guilty to all of the charges contained within the seven (7) count information. (R.1142-47). The Probation and Parole Services had prepared a score sheet totalling two hundred seventy-five (275) points thereby placing Kevin in a recommended sentencing range of seventeen (17) through twenty-two (22) years. (R.1548). Because Kevin had a prior criminal history that consisted of one (1) third degree felony and three (3) misdemeanors, one of the misdemeanors being a prior DUI conviction, he fell within the recommended range in the sentencing guidelines of twelve (12) to seventeen (17) years in the Florida Department of Corrections with a recommended sentence of fifteen (15) years. (R.1145). However, the judge could not accept the written plea and Kevin was tried for the offenses in a trial that began on December 6, 1993, and ended on December 17, 1993. (Vol.1 - Vol.11).

The State filed a notice of intent to invoke habitual offender penalties. (R.1156).

Kevin was found guilty of the two (2) counts of driving under the influence and manslaughter. (R.1474-75).

The trial court sentenced Kevin as an habitual offender (R.1541-45) to a term of thirty (30) years. (R.1533-38).

Immediately following the collision, Kevin was withdrawn from his pick-up truck at gun point by Officer Braden of the Satellite Beach Police Department, handcuffed and placed in the back of a Satellite Beach Police Department patrol car. Kevin was kept continuously in the vehicle known as the batmobile attended by Deputy Webb of the Brevard County Sheriff's Office as were various other people who were allowed admittance into the batmobile during the course of the early morning hours of May 31, 1992. As a result of the behavior of the Satellite Beach Police Department, Kevin moved to suppress certain statements, confessions or admissions (R.1105-07), as well as a motion to dismiss or suppress evidence based on the unlawful search. (R.1112-14).

Additionally, Officer Futch of the Florida Highway Patrol, who was assigned to conduct a crash investigation, advised Mr. O'Neill that he was required to give blood because of the nature of the incident. (R.1115-19). Mr. O'Neill never consented to the withdrawal of his blood but did acquiesce to the taking of his blood as opposed to requiring that force be used as threatened by Officer Futch.

Nurse Barbara Buonocore, paramedic/registered nurse, testified in deposition that the defendant did not have a flushed face nor bloodshot eyes. Consequently, Officer Futch did not have probable cause to believe that Mr. O'Neill was under the influence of alcohol as required by section 316.1933, Florida Statutes, in order

to require the defendant to give blood or threaten the taking of blood by force.

Kevin moved to suppress or, alternatively, motion in limine to exclude blood alcohol results. (R.1120-26). The original trial judge recused himself on motion for disqualification filed by the defendant. (R.1241-45;1246-47). The motion for disqualification was based on the fact that the trial court, the Honorable Judge Evander, had attended the "viewing" of the deceased involved in the accident, Satellite Beach police officers, Phil Flagg and Ed Hartmann. (R.1239-45). Judge Evander had participated in the acceptance of plea bargains in unrelated criminal cases wherein the criminal defendants would pay reduced court fines in return for their making a donation to the Flagg/Hartmann Family Fund.

The successor judge, the Honorable John Dean Moxley, Jr., entered an order to control the prejudicial publicity generated by the case. (R.1274). During the course of the post-accident investigation, Kevin's car was searched by Trooper Michael Burroughs of the Florida Highway Patrol. Trooper Burroughs was assisted and/or attended in this search by elected state attorney, Norman Wolfinger. Kevin was never asked to give consent to search his vehicle nor did he ever expressly or impliedly give consent for the search of his vehicle. (R.1281).

During the course of the post-accident investigation, the law enforcement officials were advised that Kevin had been with a person by the name of Todd the evening prior to the accident. In an effort to discover the full identity of this individual, Trooper

Burroughs searched the interior of Kevin's pick-up truck and ultimately pulled out certain papers, from which a business card fell to the ground. (R.1281). The card was a business card identifying one Todd Burns. As a result of this unlawful search and seizure, Kevin moved to suppress the business card as well as a subsequently obtained taped statement of Todd Burns later that morning. (R.1280-83).

The trial court ultimately granted the defendant's motion to the extent that the taped statement taken from Todd Burns the morning of the accident to the extent that the State would not have the statement available for impeachment of the witness during its case in chief or rebuttal. However, the statement was not suppressed as the State called Todd Burns as its witness. (R.1367).

The trial court denied the defendant's motion to suppress or, in the alternative, motion in limine to exclude blood alcohol tests results based on lack of probable cause to require the drawing of the blood sample against the defendant's will. (R.1316). The court found as a factual finding that the defendant was illegally arrested and granted the defendant's motion to dismiss or alternatively, motion to suppress based on unlawful search and seizure to the extent of the defendant being illegally arrested. (R.1316-17).

The trial court denied the defendant's motion to dismiss based on violation of due process and/or improper police conduct. (R.1108-1111;1317).

The trial court granted the defendant's motion for change of venue. (R.1130-32;1318). Venue was changed to Seminole County, Florida. (R.1320).

Kevin was released on bond and resided with his parents while he worked. (R.1379-1380).

The defendant moved to suppress blood alcohol test results and any statements or admissions made by the defendant due to the absence of *Miranda* warnings after his right to counsel attached under the Florida constitution. (R.1511-1515). The motion was denied. (R.1515).

Defendant also filed a motion to suppress or alternatively motion in limine to exclude blood alcohol results based on inadequacies of HRS regulations. (R.1120-26). The court denied the motion.

After trial, the defendant moved for a new trial. (R.1520-24).

Kevin timely perfected his appeal with the Fifth District Court of Appeal which rendered its opinion on October 27, 1995. The opinion is attached to this brief as Appendix "A."

STATEMENT OF THE FACTS

The Accident Scene

This case arose out of an automobile accident involving the defendant and Satellite Beach police officers. The defendant was operating a motor vehicle northbound on State Road A1A in Satellite Beach, Melbourne, Brevard County, Florida, when he came upon a traffic stop attended by three Satellite Beach police officers, Officer Hartmann, Officer Flagg and Officer Braden.

The traffic stop was a result of the Satellite police stopping a car load of kids in front of the Ramada Inn in the right turn lane. (Tr.676-82). That night, several friends had gotten together to go to Sebastion Inlet to night surf. There were seven of them in a Ford Mustang. There were six kids in the Mustang when they met Ken Hall and Chris Morris at Ron Jon's.

Ken Hall and Chris Morris stopped at a bait and tackle shop and bought a six pack of beer. The waves were not good at Sebastian Inlet so they decided to go home after being there forty-five minutes. The Mustang was following Hall and Morris. The police officer pulled in behind the Mustang that contained the kids. Both tires on the driver's side of the Mustang were over the white line. The police officer called for a back-up. The back-up pulled up in the through lane. The back-up officer smelled the beer on Jason, asked the age of the kids, and told them to get out of the car. (Tr.682-95). The back-up officer was Phil Flagg.

The other car that came was Supervisor Hartmann. Tami Atkinson, one of the kids in the Mustang, testified that before the

impact, Shiloh, the driver of the Mustang, was talking to the first officer. Jason was arrested for pot and drinking under the age and put in the back seat of the first police car.

As stated, Officer Hartmann had parked his patrol car on the right-hand northbound through lane of traffic. The defendant's Ford pick-up vehicle struck Officer Flagg in the north through lane and then struck the patrol car which was parked in the north through lane, which patrol car ultimately struck Officer Hartmann. This series of events resulted in the deaths of officers Flagg and Hartmann.

During the crash, Officer Braden was apparently knocked to the ground.

Officer Charles Braden testified that he and the other three officers decided to give citations and let one of the kids with a driver's license drive home. Flagg was to release Jason and Braden was to give Shiloh a citation. As he was doing this, the next thing he knew, he got hit from behind and was thrown across the top of his car. (Tr.843-48). Prior to the crash, Officer Braden made no observation of the defendant's vehicle as it drove toward the ultimate accident scene nor any observations of the defendant's vehicle as the accident occurred.

After Officer Braden got up off of the ground, he observed the defendant in his pick-up truck and immediately proceeded to him, drew his weapon, pointed it at Mr. O'Neill and ordered him out of the vehicle. (Tr.849-61). Officer Braden actually grabbed the defendant and pulled him out of the vehicle as the defendant

attempted to get out under his own power. Mr. O'Neill was immediately placed against his own pick-up truck and handcuffed. Officer Braden then put Mr. O'Neill in the back of his cruiser. (*Id.*).

Officer Braden made no observations about the defendant's condition relative to sobriety and conducted no field sobriety test prior to handcuffing the defendant.

Officer Braden testified that the reason he did not pull into the Ramada Inn parking lot when he pulled the Mustang over was because the way the Mustang was traveling he just wanted it to come to a stop. (Tr.875-88). This was not what the police considered an emergency stop.

Braden discussed the state law and Satellite Beach municipal code pertaining to prohibiting parking on a roadway. In the police department standard operating manual there is not any particular section devoted to conducting a safe traffic stop. (Tr.896).

The night of the accident, Kevin was with a friend of his, Todd Burns. (Tr.553-55). Mr. Burns testified that Kevin went over to his house in the evening. Kevin drove his Ford Ranger pick-up.

Todd and Kevin went to the grand opening of Shooter's. While there, they ran into Sharon Little. (Tr.617-23). Sharon testified that Todd and Kevin appeared to have had a few drinks previously.

Sharon hung around with Todd while Kevin would go off and mingle with other people. The three discussed leaving Shooter's around 12:00 or 12:30 in order to go to ABC because Sharon was meeting some friends there. (*Id.*).

Sharon drove because she had the least amount to drink. As they were leaving Shooter's, Sharon saw a uniform police officer off duty who questioned her if she was able to drive. (Tr.633-36). When she stated that she was, he allowed her to leave.

The bartender at Shooter's, Steven Anella, testified that he observed that Kevin O'Neill was intoxicated. (Tr.591-96). However, Mr. Anella had never seen Kevin O'Neill before the night in question. The bartender further did not notice when Mr. O'Neill left the bar. (Tr.602-05). Mr. Anella did not remember serving Mr. O'Neill before the incident and Mr. O'Neill did not have a drink in his hand at the time Anella saw him. (*Id.*). The bartender did not know how long O'Neill was at Shooter's, or what he had to drink when he got there, or even when he got there. (*Id.*).

After Sharon, Todd and Kevin had been at the ABC for a while, Kevin dropped Sharon and Todd at Sharon's apartment. (Tr.637-45). While Todd was inside Sharon's apartment, Kevin left. In Sharon's opinion, Kevin had been drinking because he was in a good mood, he was happy. She testified that he was not sloppy or falling down or staggering but he was just real happy. (Tr.643).

There was an incident at Shooter's wherein some money blew off of the counter and Kevin bent over to pick it up. (Tr.647-50). Kevin was told to leave.

Officer Edward Aziz, an officer employed by the city of Melbourne, was working security at Shooter's on May 30, 1992. (Tr.656-60). Officer Aziz was asked by the bartender to remove two

people from the bar area. Officer Aziz questioned Sharon, Todd and Kevin and allowed Sharon to drive the pick-up truck off.

Pre-Trial Hearings

Hearings on the pre-trial motions were held on September 16, September 17, December 2, December 3, 1993. (Tr.Vol.I-V). At the hearing held on the motion in limine to exclude blood alcohol test, the State presented the testimony of Trooper John Henry Futch, a Florida Highway Patrol officer, who provided a blood alcohol test kit during the course of the O'Neill investigation. (Tr.Vol.I at p.17-18). Officer Futch had the blood alcohol test kit in the trunk of his patrol car. (*Id.* at p.20).

The blood was drawn on May 31, 1992, and the kit had an expiration date of June 1, 1992. (*Id.* at p.22). The swab that was used was disposed of and not kept. (*Id.* at p.23).

The State next presented Barbara Buonocore, a registered nurse/paramedic who was called to the accident scene in the instant case. (*Id.* at p.31).

The nurse explained that the kit contains all of the tubes, the tourniquet, the vacutainer, the needle, the Betadine swab, as well as all the labels. (*Id.* at p.32).

The blood alcohol test is prepped with a Betadine swab, not an alcohol swab. Then a tourniquet is applied and the blood is drawn from the site using the needle that is in the kit and the vacutainer. She drew the blood from Mr. O'Neill. (*Id.* at p.33). After the blood is drawn, everything is supposed to be put back in the kit. However, the swab was missing. (*Id.* at p.34).

Nurse Buonocore did not check the expiration date nor did she look at the tubes to inspect whether they contained any powder substance. (*Id.* at p.37-38).

The nurse knew that swabs that were packaged in the past that were supposed to be non-alcoholic had later been discovered to have alcohol in those swabs. (*Id.* at p.40).

The State next presented the testimony of Barry Funck, a Crime Laboratory Analyst Supervisor with the Florida Department of Law Enforcement. (*Id.* at p.48). He obtained his license through the Department of Health and Rehabilitative Services. (*Id.* at p.54). Mr. Funck analyzed the sample after the testing began at 10:49 a.m. on May 31, 1992. The results were derived about an hour later at 11:40 a.m. (*Id.* at p.63). Defense counsel questioned whether or not Funck was a qualified operator. (*Id.* at 54-66). The court overruled defense counsel's objection to Mr. Funck. (*Id.* at p.70). The blood alcohol level tested to be a .22. (*Id.* at p.98).

Mr. Funck testified that if ethyl alcohol were introduced from the swab, that his instrumentation was not going to be able to determine how much ethyl alcohol was in the blood to begin with and how much was introduced through the contamination. (*Id.* at p.108). Because the blood was drawn around 3:00 or so a.m. and Mr. Funck first looked at the blood at approximately 9:00 or 10:00 a.m., if the blood had not contained some anti-coagulant it would have been clouded by then. (*Id.* at p.127).

Defense counsel argued the issue of attenuation but dealt with the finding by the court that the arrest was illegal but that the

taking of the blood was attenuated such that it was no longer tainted by the illegality of the arrest. (*Id.* at p.188). Defense counsel argued that once the court found that the handcuffing of Mr. O'Neill and the placing of him in the patrol car was an arrest, that that was without probable cause and consequently illegal, that anything derived from him was tainted. (*Id.* at p.191).

The defendant's motion to suppress statements, confessions, or admissions was held on September 17, 1993. (*Id.* at 211-358).

The Blood Test

John W. Futch, a trooper for the Florida Highway Patrol, arrived at the scene at 2:32 or 2:35 a.m. Futch and his boss, Trooper Jones, worked the accident. (Tr.928-44). Officer Futch identified the driver of the pick-up truck as Kevin O'Neill and the first contact made with him was in the batmobile.

Officer Futch talked to Kevin to get information concerning what had happened. Trooper Futch noted alcohol on Kevin's breath. Officer Futch advised Kevin he had to do a criminal investigation into his ability to operate a vehicle. Officer Futch testified that a primary function of highway patrolmen is to enforce laws of the state. This includes illegal parking on roadways, making DUI arrests, and giving field sobriety tests. (Tr.977-79). Trooper Futch testified that Mr. O'Neill was not given a field sobriety test at the scene of the accident.

Trooper Futch verified that the law had been broken when the officers stopped their vehicles in the position they were in at the time of the accident. (Tr.979-95).

Officer Futch described a batmobile. (Tr.947-48). The vehicle contains cabinets, has an intoxylizer 5000 unit and is equipped with a video camera. He stated that it was in a well lighted area. He further testified that this was where the blood was drawn from Kevin O'Neill at 3:00 a.m., May 31, 1992. (*Id.*).

The blood alcohol kit was taken from the trunk of Trooper Futch's vehicle. The blood kits were issued at the station and the troopers carry them in their cars. (Tr.943-47). Noted is the fact that the blood kit used on Kevin O'Neill had an expiration date of 6/1/92, which is the very next day after the date of the accident, May 31, 1992. (Tr.999-1000).

Although Trooper Futch had ample opportunity, area and personnel to do a field sobriety test on Mr. O'Neill, he did not do that. (Tr.1016-17).

Officer Futch reiterated that there are traffic rules for law enforcement officers that must be followed. He also declared that one cannot park on A1A. (Tr.1024-26). Barbara Buonocore, a paramedic working for Harbor City Ambulance at the time of the accident, took blood from Kevin O'Neill in the batmobile the night of the accident. (Tr.1027-33).

In her deposition, Barbara Buonocore had stated that Kevin O'Neill's eyes did not appear dilated, although in court she said they were dilated. In deposition she had also testified that he appeared to be able to walk around by himself fine in the batmobile but in court she testified he was swaying and needed the help of Trooper Futch. (Tr.1040-47).

She did state that Mr. O'Neill's behavior did not seen accurate with a .22 blood level. He was not sloppy drunk. (Tr.1040-49).

During her testimony in front of the jury, the witness made a derogatory statement toward the defense attorneys to the effect that defense attorneys have gotten away with things before and she was not about to allow that to happen. Defense counsel objected and moved for mistrial. The court spoke to the witness and asked her to step down. The mistrial was denied. (Tr.1049-61).

Buonocore discussed that she did not observe any alcoholic containers in Kevin O'Neill's truck. Nor did she smell the odor of alcohol in the truck. (Tr.1064-66).

Although she drew Mr. O'Neill's blood, when asked if she noticed a substance in the tube before drawing the blood, she stated that she did not recall. (Tr.1035-36).

Candy Grossman, an employee at Becton Dixon, identified the blood alcohol collection kit used on Kevin O'Neill as one that they manufacture. (Tr.1085-88). Ms. Grossman described the different versions of the blood collection kits. She testified, however, that her company does not manufacture the wipes or the plastic holders or the cardboard boxes which are components of the blood collection kits. (Tr.1098-1101). The kits are not sealed by tape, they are just shut in a box. Anyone could have access to those boxes during route from plant to receiver.

Ms. Grossman testified that her company did not produce the tubes with the liquid in the kit. The tubes come with a powder in

the kit as it is a better preservative. The witness reiterated that liquids are not put in the kits with a serial number 4990, which was the same as used in Kevin's case. (Tr.1105-07). It must be noted, however, that Barbara Buonocore stated there was a clear liquid in the tube before she drew the blood -- not powder.

David A. Tucker, an employee at Becton Dixon Vacutainers Systems Division, explained the vacutainer. (Tr.1123-27). The vacutainer is a glass test tube and a rubber stopper with two chemicals added for preservative of the blood collected. As to the additives in the test tube, he testified that they follow regulations put in a book by American Medical Association.

Mr. Tucker testified that they do not test to make sure that each chemical is in the proper weight in the vial; they simply measure total weight. (Tr.1161-64).

The witness testified that he was not aware of any kit used for law enforcement that were designed to contain a liquid. (Tr.1171-73).

Dennis Webb, a deputy for Brevard County Sheriff's Department, responded to a call to take a DUI individual at 2:27 a.m. (Tr.1298-1310). Webb testified that he got Kevin out of the police vehicle and noticed alcohol on Kevin's breath. Webb stayed with Kevin until the trooper took him at 8:00 to 8:15 the next morning. Webb was present when the video was done and the blood was taken.

Charles R. Jones, of the Florida Highway Patrol, Brevard County, Cocoa office, testified that he did an accident reconstruction and noted that there were no skid marks. (Tr.1417-

1421). He testified that situations such as falling asleep and not seeing all of the lights up ahead would be a reason for no brake action. The situation with Kevin was consistent with possibly falling asleep because there were no skid marks and because of the approach pattern. (*Id.*).

Trooper Jones arrested Kevin at approximately 9:00 a.m. However, he had arrived at the scene earlier at 2:30 a.m. (Tr.1425-27).

The witness stated that the driver could have fallen asleep under the influence. He stated that definitely someone did not recognize the lights in front of him to react properly. (Tr.1420-31).

The State put on an accident reconstruction specialist out of Jacksonville, Florida, Walter Kennedy. (Tr.1465-1545). However, he was not qualified with the state of Florida as an expert at the time of his testimony. (Tr.1470-76). Over objection, though, the court accepted Kennedy as an expert. (Tr.1487-92).

The defendant's first and only witness, James Clark, is co-owner of Rimbey, Howell & Rimbey, which is a consulting engineering firm. (Tr.1774-81). He is licensed with the state of Florida and is recognized as an expert witness in reconstruction of accident scenes in Florida.

Mr. Clark calculated the speed of Kevin's vehicle at 38 to 44 miles per hour. (Tr.1797-1809). The speed limit in the area was 45 miles an hour. (Tr.1815-22).

Mr. Clark testified that considering that Kevin's vehicle had

been observed several blocks away traveling at a high rate of speed on the inside through lane as well as the factor of the 38 to 44 miles per hour speed, no skid marks, and the lighting from police car, street lights, *etc.*, that those factors were consistent with someone who had fallen asleep or dozing. This was a typical situation which involved slowly changing lanes, no skid marks and a slow reduction of speed. (Tr.1826).

The State's expert witness, Walter Kennedy, acknowledged that he had incorrect information when he gave his opinion. (Tr.1547-50). For example, his calculations were based on clear, dry weather conditions whereas it had been raining the night of the accident.

Michael L. Burroughs, a Florida Highway Patrol officer assigned to Brevard County, responded to the accident in order to coordinate officers with their duties at the scene. (Tr.1570-71).

Barry Charles Funck was employed by the state of Florida, Florida Department of Law Enforcement at Orlando Regional Crime Laboratory. (Tr.1611-14). Mr. Funck discussed gas, chromatography, which is a machine that determines the blood alcohol level and how it works. (Tr.1616).

Mr. Funck discussed the reliability of the kit. Although the nurse unequivocally declared that there was a liquid in the vial, Mr. Funck stated that it was to have been a powder. Also it must be noted that the manufacturer stated that it was a powder. (Tr.1656-1694). Mr. Funck testified that there was a possibility that something could have been injected into the tube and not

noticed. (Tr.1729-32). Mr. Funck stated that liquid in the tube was a big concern. (Tr.1758-60).

The witness specifically declared that he would be very concerned in there was liquid in the vial before the draw; he would be concerned with the condition of the vial before the blood was taken. (Tr.1760-61).

The Fifth District Opinion

The Fifth District noted that the trial judge imposed two (2) thirty-year concurrent habitual offender sentences, which sentences are beyond the permitted guidelines range, but within the statutory maximum. The court cited to section 775.082, Florida Statutes (1991). The Fifth District also noted that O'Neill had claimed the trial court erred in relying on a South Carolina "misdemeanor" conviction as one of the two convictions necessary to support an habitual offender sentence. The Fifth District affirmed the judgment and sentences in all respects but certified the following question as one of great public importance because of the doctrine of lenity in interpreting criminal statutes:

> May an out-of-state conviction which is a misdemeanor in that state, but which is substantially similar to a Florida statute in elements and penalties, be deemed a "qualified offense" under section 775.084 and used to impose an habitual offender sentence?

O. at 6-7. The State sought habitualization based on predicate offenses consisting of a 1981 Ohio conviction for "aggravated trafficking in narcotics" and a 1988 South Carolina conviction for "possession of cocaine." The 1988 conviction arose when Kevin was charged with and pleaded guilty to a misdemeanor under South

Carolina Code Annotated, section 44-53-370(d)(1). Said section makes possession of cocaine a misdemeanor when it is pled as a first offense. Kevin's sentence was suspended with the imposition of five years probation.

This Court reserved ruling on jurisdiction until after the briefs on the merits were filed.

SUMMARY OF THE ARGUMENT

A prior conviction obtained in a constitutionally invalid manner cannot be used against an accused in a subsequent criminal proceeding to support guilt or to increase punishment. Due process of law requires that in order to provide the basis for a judgment of conviction, a guilty plea must be made voluntarily. If Kevin had pled guilty to a misdemeanor which, as it turned out, was a felony, then Kevin's plea would be involuntary. Accordingly, if that had been the facts, Kevin would have been able to withdraw his guilty plea as being involuntary.

That same reasoning would preclude using Kevin's plea to a misdemeanor as a felony in order to habitualize Kevin. Kevin would not have pled guilty to the charge if it had been a felony. To change the crime from a misdemeanor to a felony after the fact denies Kevin due process of law.

Kevin O'Neill had never spent a single day in jail but yet he was sentenced to thirty (30) years in prison as an habitual criminal. In categorizing Kevin as an habitual offender, the trial court utilized two out-of-state convictions. One was a 1981 third degree felony in Ohio and the second was misdemeanor possession of cocaine in South Carolina. Because the offense in South Carolina was not a felony the trial court erred in sentencing Kevin as an habitual offender.

In order to be a qualified offense, the out-of-state conviction must be substantially similar in elements and penalties to an offense in Florida. The only offense in Florida that is

substantially similar in elements and penalties is a misdemeanor possession of marijuana. Consequently, because Kevin had not been previously convicted of any combination of two or more felonies in Florida or other qualified offenses as required by section 775.084(1)(a)1, Florida Statutes, the trial court erred in enhancing his sentence.

The trial court also erred in admitting the test results of Kevin's blood alcohol level due to the fact that the vial used in Kevin's testing contained a liquid. The unrebutted and unequivocal testimony was that the vials used by law enforcement officers to test blood alcohol level contained a powder. The manufacturer's own expert testified that he would be very concerned if the vial contained a liquid rather than a powder. Because Kevin's blood alcohol test had obviously been tampered with, the trial court erred in admitting it into evidence.

Additionally, there was no probable cause to believe that Kevin was drunk at the time of the accident. Therefore, there was no legal basis to force Kevin to submit to a blood alcohol test.

ARGUMENT

POINT I

THE FIFTH DISTRICT ERRED IN HOLDING THAT THE DEFENDANT WOULD BE SENTENCED TO AN EXTENDED TERM AS AN HABITUAL FELONY OFFENDER PURSUANT TO SECTION 775.084, FLORIDA STATUTES (1991)

Kevin O'Neill was before the trial court for sentencing on two second degree felony counts of DUI/manslaughter. Those convictions arose from a traffic accident involving fatalities which occurred on Sunday, May 31, 1992. Pursuant to section 775.082, Florida Statutes, the maximum statutory term of incarceration applicable to a second degree felony is fifteen (15) years in length. Probation and Parole Services had prepared a score sheet totaling 275 points - placing Kevin in a recommended sentencing range of seventeen (17) to twenty-two (22) years, and a permitted range of twelve (12) to twenty-seven (27) years. Kevin submits that he did not meet the statutory criteria for being declared an habitual offender because two (2) felony or qualified offenses are needed to trigger the habitual criminal statute.

The issue before the Fifth District and before this Court is whether Kevin can be declared an habitual offender and be given an enhanced sentence when one of the out-of-state predicate offenses relied upon for habitualization was a misdemeanor under the law of that foreign jurisdiction for which Kevin pled guilty. Kevin submits that this Court should answer the certified question in the negative based on fundamental constitutional dictates of due process, among other reasons.

A. The history of Florida's habitual offender statute.

Research was undertaken by the staff of the Economic and Demographic Research Division at the request of the House Committees on Criminal Justice and Corrections in 1992. Joint Legislative Management Committee, Economic and Demographic Research Division, *An Empircal Examination of the Application of Florida's Habitual Offender Statute* (1992). Of the three (3) questions addressed by the research, the first question is helpful in answering the question certified by the Fifth District. The question was whether the habitual offender statute was being used selectively against the very worst offenders. *Id.* at iii.

The researchers declared that in light of the shortage of prison resources and the consequence of the necessity to release most inmates after serving an average of one-third of their sentences, it was important that programs that exasperate the problem by extending the effective sentence length of certain inmates, focus their efforts on the very worst offenders. "Unless the program is limited to the worst offenders it will necessarily result in the early release of some inmates who are a greater threat to society than those being kept in prison. Such a practice would be wasteful of scarce prison resources and public funds." *Id.*

In reaching its conclusions, the researchers noted that the first habitual offender statute of general application was adopted by the Florida legislature in 1927. With the establishment of the Parole Commission in 1941, habitual offenders were made eligible

for parole. The law, therefore, was modified in 1971 to provide that the court could impose harsher sentences on habitual offenders if necessary for protection of the public. *Id.* at 1. Various changes to the statutes were made during the 1970's.

Sentencing underwent a major revision in 1983 with the advent of sentencing guidelines. Florida moved from a system of indeterminate sentencing, characterized by the use of parole and the goal of rehabilitation, to a system of determinate sentencing with no parole and the primary purpose of punishment. *Id.* at 2.

In *Whitehead v. State*, 498 So.2d 863 (Fla. 1986), however, the Florida supreme court ruled that the existing habitual offender statute conflicted with sentencing guidelines and was implicity invalidated. The court pointed out that prior record was explicitly included in the factors determining the recommended guideline sentence; to further enhance the sentence because of the prior record would be to doubly count the prior record in determining the recommended sentence. *Id.*

The Florida legislature avoided the conflict raised in *Whitehead* by statutorily exempting such sentences from sentencing guidelines. The 1988 habitual offender statute excluded habitual offenders from both basic gain time and any type of sentence reduction designated primarily to reduce overcrowding, such as early release by Control Release Authority. Under section 947.146, Florida Statutes, the Parole Commission, sitting as the Control Release Authority, is permitted to reduce the sentence of inmates who meet certain criteria in order to keep the prison population

within federally prescribed limits and avoid the use of less selective release mechanisms. Gain time and early release exclusions meant that an offender sentenced under the habitual offender statute would serve an average of seventh-five percent (75%) of the sentence imposed as contrasted to non-habitualized offenders which serve an average of thirty-three percent (33%) of the sentence imposed. *Id.* at 3.

Kevin submits that not only does he not fall within one of those classes of inmates from whom society needs protecting, his South Carolina conviction does not fall within the purpose of section 775.084 which allows for a defendant to be classified as an habitual felony offender. Kevin further submits that the Florida legislature included language which allows for a qualified offense in order to insure that the offense for which a defendant is being habitualized is at a minimum a felony in Florida. It is offensive to due process principles to allow Florida to habitualize Kevin when he pled guilty to a misdemeanor in South Carolina. Because of the vast difference to pleading to a felony and pleading to a misdemeanor are great, it is constitutionally offensive to enhance the South Carolina misdemeanor to a felony.

B. To habitualize Kevin for a crime to which he pled guilty to was a misdemeanor is a denial of due process of law.

A prior conviction obtained in a constitutionally invalid manner cannot be used against an accused in a subsequent criminal proceeding to support guilt or to increase punishment. *E.g.*, *Loper v. Beto*, 405 U.S. 473, 481, 92 S.Ct. 1014, 1018, 31 L.Ed.2d 374

(1972); *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Due process of law requires that in order to provide the basis for a judgment of conviction, a guilty plea must be made voluntarily. *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A guilty plea may be involuntary in the constitutional sense for one of two reasons. First, a plea may be involuntary because a defendant does not understand the nature of the constitutional protections he is waiving. *Henderson, supra*, 426 U.S. at 645n.13, 96 S.Ct. at 2257n.13; *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023-24, 82 L.Ed. 1461 (1938).

Alternatively, a plea may be involuntary because the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson, supra*, 426 U.S. at 645n.13, 96 S.Ct. at 2257n.13. In the latter case, a plea is not voluntary unless the defendant received "'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.* at 465, 96 S.Ct. at 2257, *quoting Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941).

To establish that the constitutional requirement of voluntariness has been satisfied, the record as a whole must affirmatively demonstrate that the defendant understood the constitutional rights he was waiving and the critical elements of the crime to which the plea was tendered. *People v. Wade*, 708 P.2d 1366, 1368-69 (Colo. 1985). A review in court cannot presume from

the mere fact that a guilty plea was entered that the defendant waived his constitutional rights and understood the critical elements of the crime with which he was charged. *Boykin, supra,* 395 U.S. at 242-43, 89 S.Ct. at 1711-12.

Florida law requires that in order for a defendant to be sentenced as an habitual offender, the prior convictions must be entered voluntarily. 498 So.2d 1022 (Fla. 2d DCA 1986). If the State now were allowed to substantively change the crime to which Kevin pled guilty, *i.e.*, from a misdemeanor to a felony, is in essence rendering Kevin's prior guilty plea involuntary as the substance of the crime is no longer the one to which Kevin pled.

This position is consistent with the petitioner's reading of section 775.084, Florida Statutes (1991). Although under 775.084(1)(c) a "qualified offense" can be read the way the Fifth District read the section, it can also be read to mean that the offense must at least be a felony under Florida law. For instance, a foreign jurisdiction may classify the theft of a pack of chewing gum as a felony but that same crime could not be a qualified offense in Florida as it is not a felony. Such an interpretation is consistent with the history of the habitual offender statute and the Florida legislature's intent to apply to the worst offenders.

There is no question but under Florida law Kevin would be permitted to withdraw his plea of guilty to the 1988 South Carolina conviction if it turned out that the crime to which Kevin pled was a felony rather than a misdemeanor. *See Edwards v. State*, 610 So.2d 707 (Fla. 4th DCA 1992) (defendant was entitled to withdraw

guilty plea on grounds that defendant misunderstood length of sentence where a defendant understood sentencing range to be seven (7) to nine (9) years in trial court's consecutive sentence amounted to twelve (12) years incarceration).

C. Guidelines "scoring" cases.

Although the Fifth District found this analogy not to be persuasive, the petitioner submits that the reasoning is analogous and compelling.

In the guideline scoring context, an out-of-state conviction is not to be scored, whatsoever, if there is no analogous or parallel Florida criminal statute. *Frazier v. State,* 515 So.2d 1061 (Fla. 5th DCA 1987) (error to score prior military offense of being absent without leave as a misdemeanor, under Florida Rules of Criminal Procedure 3.701(d)(5)(a), when there was no analogous or parallel Florida statute for the offense of being AWOL). Hence, defendant's first argument is that, for purposes of section 775.084(1)(c), South Carolina's misdemeanor cocaine possession offense is not a "qualified offense" because it is not "substantially similar in elements and penalties" to any analogous or parallel Florida criminal statute.

Unlike South Carolina, Chapter 893 of Florida Statutes contains no similar provision which relegates many simple possession charges of small amounts of contraband to misdemeanor status. In terms of "elements and penalties" Florida's closest offense is the misdemeanor cannabis possession crime proscribed at section 893.13(1)(g).

A second key principle appropriately drawn from "scoring" cases is the principle that prior convictions should be classified just as they were originally classified at the time of the convictions. *Roberts v. State*, 507 So.2d 761 (Fla. 1st DCA 1987); *Johnson v. State*, 476 So.2d 786 (Fla. 1st DCA 1985), *rev. dismissed* 482 So.2d 348 (Fla. 1985); *Frazier v. State*, 515 So.2d 1061, 1062 (Fla. 5th DCA 1987) (despite fortuitous, subsequent decriminalization, defendant's prior convictions for traffic infractions of speeding and failure to drive in a single lane were properly scored as misdemeanors). In this case, basic notions of due process and fundamental fairness strongly militate against the imposition of an enhanced sentence which is achieved by transforming a conviction originally classified as a misdemeanor into a felony. Indeed, the defendant submits that such an application of section 775.084 to him violates the due process clauses found at Article I, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

A third important reason for not treating the South Carolina misdemeanor conviction as the equivalent of a Florida "felony" conviction is based on the principle that any uncertainty in whether to treat an out-of-state conviction as a misdemeanor or a felony should be resolved in the defendant's favor. *Walsh v. State*, 606 So.2d 636 (Fla. 5th DCA 1992) (ambiguity regarding a previous judgment for sentencing purposes must be construed against the State and in favor of the defendant). Such treatment is

entirely consistent with the fact that section 775.084 is a penal statute that is to be strictly construed. Relying again on the analogy provided by Florida Rules of Criminal Procedure 3.701(d)(5)(c), uncertainty as to whether a "prior record" offense is a misdemeanor or a felony should be resolved by treating the prior conviction as a misdemeanor. *Abbot v. State*, 482 So.2d 1391 (Fla. 1st DCA 1986) (error to treat out-of-state conviction for assault as a felony merely because the two year probationary sentence imposed by Connecticut would not have been an appropriate misdemeanor disposition under Florida law); *Rodriguez v. State*, 472 So.2d 1294 (Fla. 5th DCA 1985) (Michigan misdemeanor conviction for possession of marijuana with intent to deliver was improperly scored as a third degree felony notwithstanding the existence of section 893.13(1)(a)(2) which makes possession of cannabis with intent to deliver a third degree felony under Florida law); *Arguila v. State*, 464 So.2d 716, 717 (Fla. 4th DCA 1985) (error to score two North Carolina convictions as felonies where, *inter alia* "there [was] some doubt about whether the North Carolina crimes [were] felonies or misdemeanors . . ."); *Holder v. State*, 470 So.2d 88 (Fla. 1st DCA 1985) (error to score four out-of-state convictions as felonies when uncertainty existed as to whether those convictions were felonies or misdemeanors).

Assuming *arguendo* that the defendant was properly found, by a preponderance of evidence, to meet the statutory criteria for habitualization, section 775.084 imposed upon the trial court the ministerial obligation to enter a finding that the defendant was an

habitual offender. *King v. State*, 597 So.2d 309 (Fla. 2d DCA) (*en banc*), *review denied* 602 So.2d 942 (Fla. 1992), *approved McKnight v. State*, 616 So.2d 31 (Fla. 1993). Having made that determination, the trial court had the discretion to sentence the defendant pursuant to section 775.084(4)(a)(2) to any term of incarceration up to thirty years.[1] Stated differently, the trial court can sentence a qualifying defendant as an habitual offender to a sentence either above or below the recommended guideline sentence and without regard to any guidelines limitations. *King v. State, supra*, 597 So.2d at 317. Technically, this means that any sentence of defendant, as an habitualized felony offender, could range from one (1) year to thirty (30) years. *Id* at 317.

Pursuant to *King, id.*, at 314, 315, 317 the second primary way a sentencing judge can exercise discretion or lenity in regard to an habitual felony offender is to simply decide not to sentence him or her as an habitual felony offender. *See also Seabrook v. State*, 629 So.2d 129 (Fla. 1993). In this latter instance the court would use §775.084(4)(c) to declare that an enhanced sentence is not necessary for the protection of the public; then impose any sentence (including probation or community control) that comports with the sentencing guidelines or departure rules. *King v. State,*

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[1]Kevin O'Neill's maximum sentencing exposure under §775.084 is thirty years per count; however, the enhanced sentences must run concurrently since the multiple offenses of conviction arose out of a single criminal episode. *Hale v. State*, 18 Fla.L.Weekly S535 (Fla., October 14, 1993); *Brooks v. State*, 18 Fla.L.Weekly S573 (Fla., October 18, 1993); *Edler v. State*, 18 Fla.L.Weekly S643 (Fla., December 16, 1993); *Daniels v. State*, 595 So.2d 952 (Fla. 1992); *Smith v. State*, 19 Fla.L.Weekly D260 (Fla. 2d DCA, February 2, 1994).

supra at 314, 315, 317.

Kevin O'Neill's criminal record, though lengthy, consists primarily of drug/alcohol related offenses, coupled with traffic offenses. The DUI/manslaughter offenses he was before the trial court on are different in terms of the severity of consequences, but, otherwise, are entirely consistent with his prior record because of the common threads of substance abuse and irresponsible driving.

In the case at bar, this court should consider the fashioning of a sentence which seeks to strike a needed balance between retribution and "[t]he economic and moral costs to the system. . ." that flow from the imposition of prolonged incarcerative sentences devoid of rehabilitative consideration. *See generally Jordan v. State*, 562 So.2d 820, 821-24 (Fla. 4th DCA 1990), Glickstin, J., concurring, (concurring opinion describing, among other things, the social and economic costs of "warehousing" defendants in prison compared with effective drug education and treatment programs).

A final policy consideration which militated against the imposition of either an enhanced sentence or a maximum enhanced sentence on Kevin O'Neill comes from the fact that pursuant to the "Safe Streets Initiative of 1994" (effective January 1, 1994 and applicable to offenses committed on or after that date), the legislature has amended Florida's habitual felony offender statute in such a way as to restrict the use of the statute to impose enhanced incarcerative sentences on people whose criminal conviction record is primarily an outgrowth of drug problems.

For all of these reasons, the petitioner urges this court to find that the trial court should have refrained from sentencing him as an habitual offender, or, alternatively, should have refrained from imposing a maximum term habitualized sentence.

The defendant also submits that to enhance the misdemeanor conviction of cocaine possession to a felony would be an *ex post facto* law as to Kevin. While acknowledging that this court has held that the habitual violent felony offender statute did not violate constitutional prohibition against *ex post facto* laws, the enhancement statute as to Kevin would. *Raulerson v. State*, 609 So.2d 1301 (Fla. 1992).

Kevin pled guilty to the cocaine possession charge because it was a misdemeanor. If part of what Kevin bargained for was to plead to a misdemeanor rather than a felony, to raise that misdemeanor to a felony some five years later is not only fundamentally unfair but is an *ex post facto* application as to Kevin.

Mr. O'Neill would not have plead to the 1988 South Carolina charge if it had been a felony.

The Fifth District dispensed with Kevin's argument regarding guidelines "scoring" cases under Florida Rule of Criminal Procedure 3.701 by alleging that those cases rely on the "Committee Note to Rule 3.701(d)(5) which direct that uncertainties in scoring "prior record" and guideline sentences be resolved in favor of the defendant. Kevin submits, however, that because this Court has held that the habitual offender statute must be complied with

strictly, *Massey v. State*, 609 So.2d 598 (Fla. 1992); *Reynolds v. Cochran*, 183 So.2d 500 (Fla. 1962), that that holding likewise requires the habitual offender statute be resolved in favor of the defendant when one considers that the "qualified offense" interpretation submitted by Kevin renders the statute ambiguous.

The petitioner's interpretation of section 775.084(1)(a)(1) to mean that a qualified offense must at least be a felony in Florida is as reasonable an interpretation as the Fifth District's interpretation. Therefore, because the statute must be construed strictly, the ambiguity must be resolved in favor of the petitioner.

POINT II

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE BLOOD ALCOHOL TEST RESULTS BASED ON LACK OF PROBABLE CAUSE TO REQUIRE THE DRAWING OF THE BLOOD SAMPLE AGAINST THE DEFENDANT'S WILL

Based on the facts that Officer Futch advised Mr. O'Neill that he was required to give blood because of the nature of the incident, Mr. O'Neill refusing to voluntarily give a blood sample, and then being told that if he continued to give blood that blood would be drawn from him, unequivocally shows that the defendant's blood draw was non-consensual. Consequently, it was proper only under section 316.1933, Florida Statutes, if at all.

Officer Futch did not have probable cause to believe that Kevin was under the influence of alcohol as required by section 316.1933 in order to require the defendant to give blood or threaten the taking of blood by force. At the time Officer Futch requested the blood draw from Mr. O'Neill, no other law enforcement officer had made any observations or communicated the same to him regarding the odor of alcohol or impairment of the defendant. Furthermore, Officer Futch had made no observation which could be considered inconsistent with the defendant being involved in an accident and furthermore, his claimed observations were rebutted by a trained paramedic/registered nurse who was present at the time the blood was drawn.

There was no probable cause to believe that the defendant was under the influence as contemplated by section 316.1933.

Kevin's blood test results and any statements or omissions made by him should have been suppressed due to the absence of

Miranda warnings even after his right to counsel attached under the Florida Constitution.

The trial court held that when Officer Braden physically removed Kevin from his pick-up truck at gun point, handcuffed and placed him in the back of a Satellite Beach Police Department patrol car, his actions effected an immediate and full-blown arrest of Kevin. After he was removed from the back of a Satellite Beach Police Department patrol car, Kevin was kept in the vehicle known as the batmobile, and he remained in the custody of some law enforcement agency from the time that he was extracted from his truck until such time as he was delivered to the Brevard County Correctional facility for booking. During this time he was alleged to have made certain statements or omissions. Also during this time, the defendant was required, involuntarily, to submit to a blood draw.

In *Trayler v. State*, 596 So.2d 957 (Fla. 1992), the Florida supreme court had occasion to discuss how states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the Federal Constitution permits. *Id.* at 961.

The court in *Trayler* was presented with the question of when an accused has a right to counsel. The court held that in order to be admissible, any confessions must pass muster under both the state and federal constitutions. The court declared that special vigilance is required where the fundamental rights of Florida

citizens suspected of wrongdoing are concerned, for the court declared that in that situation society had a strong natural inclination to relinquish incrementally the hard one and stoutly defended freedoms enumerated in our Declaration in its effort to preserve public order. Citing to Florida's Declaration of Rights, the court declared that the rights embraced a broad spectrum of enumerated and implied liberties that conjoin to form a single overreaching freedom: "That protect each individual within our borders from the unjust encroachment of state authority - from whatever official source - into his or her life. Each right is, in fact, distinct freedom guaranteed to each Floridian against government intrusion. Each right operates in favor of the individual, against government." *Id.* at 963.

The court noted that the important role that confessions play in the crime resolving process and the great benefit they provide that in obtaining such statements a main focus of Florida confession law has always been on guarding against one thing - coercion. *Id.* at 964. After an in-depth analysis of Florida law and the experience under *Miranda* and its progeny, the court held that to insure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, required that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them. The court then declared that if a

person was in custody for Section 9 purposes, if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrests. *Id.* at 966 n. 16.

The court further declared that if interrogation took place for Section 9 purposes when a person was subjected to express questions or other words or actions, by a state agent, that a reasonable person would conclude was designed to lead to an incriminating response. *Id.* at 966 n. 17.

In *Allred v. State*, 622 So.2d 984 (Fla. 1993), the supreme court held that the *Trayler* analysis used in the Florida Constitution, rather than the right to counsel provided in the United States Constitution, was applicable and governed when the right to counsel attaches in DUI cases.

The *Allred* court initially cited to *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990). *Muniz* held that compelling and arrested drunk-driving suspect to disclose a date of his sixth birthday was a "testimonial" response. Because *Muniz* was not read his *Miranda* rights before he was asked the sixth-birthday question, his Fifth Amendment privilege against self-incrimination was violated by admitting at trial an audio tape of his response.

The Supreme Court in *Muniz* explained that "to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only when there is a person compelled to be a 'witness' against himself." *Id.*, 496 U.S. at 589, 110 S.Ct. at 2643. The court declared that

Muniz' response to the sixth-birthday question was incriminating not just because of his delivery, but also because the content of his answer supported an inference that his mental state was confused.

The defendant submits that it is undisputed that he was in custody as the trial court so held. Since *Miranda* warnings were not given to Mr. O'Neill at that point when he was seized by Officer Braden, any incriminating physical evidence and verbal responses gained in the absence of *Miranda* warnings should have been suppressed.

Because Mr. O'Neill had a right to counsel *before* being required to submit or acquiesce to a blood draw, the incriminating results of that blood draw should have been excluded based on Officer Braden and other officers' failure to advise defendant of his right to counsel prior to questioning him as to whether or not he would submit to the blood draw. *See State v. Spenser*, 750 P.2d 147 (Or. 1988) (under Oregon state constitution, rather than the federal constitution, a suspect had a right to counsel before being asked to take a breath test notwithstanding the fact that Oregon implied consent law did not require that a suspect being given access to counsel; Spenser's breath test results should have been excluded since he was not advised of his right to counsel before agreeing to take the breath test.

The improper police conduct is another independent ground for suppressing the blood test results. As stated, immediately preceding the crash in the instant case, Officer Braden removed

Kevin from his Ford pick-up motor vehicle at gun point, placed him in handcuffs and placed him in the back of a Satellite Beach Police Department patrol car. Approximately thirty minutes later the defendant was removed from the Satellite Beach Police Department patrol car and escorted arm in arm by Deputy Webb of the Brevard County Sheriff's Office to a vehicle known as a batmobile.

The defendant was kept in the batmobile until his release to the Florida Highway patrol for transportation to the Brevard County Correctional facility which was for approximately six hours. During that time, the only test administered to gauge the defendant's sobriety was a blood withdrawal for analysis by the Florida Department of Law Enforcement Crime Laboratory.

Kevin was never required not provided the opportunity to perform field sobriety tests to either confirm or rebut any suspicion that he was impaired from his alleged consumption of alcohol or other controlled substances. There was ample time and ample opportunity for the administration of field sobriety tests.

The batmobile operated by Deputy Webb contained a video camera and spot light sufficient for the administration of field sobriety tests. In fact, the batmobile was routinely used to field test suspected DUI defendants at or near the scene of the alleged DUI violation throughout Brevard County. Routinely the Brevard County Sheriff's Office videotapes suspected DUI offenders by use of the equipment provided in the batmobile. The failure to videotape Kevin amounts to a willful failure to follow normal procedure with the intent to preclude the defendant from obtaining exculpatory

evidence.

POINT III

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE ALCOHOL TEST RESULTS BECAUSE THERE WAS AN INDICATION OF PROBABLE TAMPERING WITH THE VIAL

The evidence adduced below was that the vial used to test Kevin's blood alcohol level was supposed to contain a powder. The evidence was unrebutted. The vial actually used in Kevin's case, however, contained a liquid, not a powder. The following facts support the defendant's position that the alcohol blood level test was not reliable.

On the morning of May 31, 1992, Kevin O'Neill was placed in the back of a Satellite Beach batmobile at the scene of an accident in which he was involved for a possible alcohol related blood draw.

Florida Highway Patrol officer, John Futch, accompanied paramedic Barbara Buonocore as she performed the blood draw on Kevin O'Neill in the batmobile. This blood draw was also videotaped by the video camera in the batmobile.

After the draw, Buonocore is seen on video shaking vials of blood and leaning forward supposedly making notes. (Tr.1744). All components of the blood alcohol collection kit were said to have been put back into the original box and resealed and later transferred to the lab for testing.

When the lab received the box, the seal was broken and contents were checked to begin testing of samples. Upon checking the contents, the swab and its packaging were missing. Without questioning this, the State performed testing of the blood sample and reported its findings.

Along with the fact that the swab was missing from the sealed blood collection kit, the actual vacutainer vial which holds the blood specimen had in some way been tampered with. The paramedic, Barbara Buonocore, stated in court, under oath, that the vacutainer which she used to draw blood from Kevin O'Neill had a liquid substance in it. (Tr.1074). She was sure of this because she always checks the chemicals in the vacutainers (Tr.1068-69), before she does a blood draw.

However, the State's expert witness, Barry Funck, who works for the Florida Department of Law Enforcement at the Orlando Regional Crime Laboratory, stated under oath hat the Becton Dickinson blood kit which is used by the law enforcement officers is very reliable. (Tr.1759). He also testified that there should be a powder preservative in each blood kit vial. He further testified that he would be very concerned if he had heard testimony in this case that there was liquid in the vial in question. He would certainly be concerned and question the condition of the vial. (Tr.1761).

The vials in question were made by Becton Dickinson Vacutainers systems Division which is a division of Becton Dickinson who also manufacturer the blood kit the vacutainers go into. David Tucker, quality control manager of Becton Dickinson's vacutainer division stated under oath that this particular batch of vacutainers OE128 which are a part of the blood collection kit 4990 contains two powder chemicals which are EDTA and sodium fluoride. (Tr.1124). The company does produce liquid in some vials for other

purposes, but the powder is used strictly for law enforcement purposes. (Tr.1170). David Tucker also states that the two powder chemicals do not change into liquid. (Tr.1197)

The law in Florida is unequivocal and clear that if there is an indication of probable tampering with evidence, then even relevant evidence is inadmissible. *Peek v. State*, 395 So.2d 492, 495 (Fla. 1981), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). The fact that there was contamination is supported by the manufacturer of the vacutainers when he testified that powder is used in vials for law enforcement purposes while liquid in some vials are produced for other purposes. In the instant case, therefore, there was more than probability that the evidence had been tampered with but, rather, the evidence had to have been tampered with because of the liquid in the vial. *Bush v. State*, 543 So.2d 283, 284 (Fla. 2d DCA 1989). *Accord, Stunson v. State*, 288 So.2d 294 (Fla. 3d DCA 1969), *cert. denied*, 237 So.2d 179 (Fla. 1972).

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the appellant respectfully requests that this Honorable Court reverse the judgment and sentence below.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, to Kristen Davenport, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, this 15th day of January, 1996.

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Appendix A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1995

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

KEVIN O'NEILL,

Appellant,

v.

CASE NO. 94-819

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed October 27, 1995

Appeal from the Circuit Court
for Brevard County,
John Dean Moxley, Jr., Judge.

Sharon Lee Stedman
of Sharon Lee Stedman, P.A.,
Orlando, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kristen L. Davenport, Assistant
Attorney General, Daytona Beach, for Appellee.

SHARP, W., J.

O'Neill appeals his sentences after being convicted of two counts of DUI/manslaughter.[1] He was involved in a traffic accident, which claimed the lives of two police officers in Brevard County. The trial judge imposed two thirty-year concurrent habitual offender sentences, which were beyond

[1] § 316.193(3)(c)3, Fla. Stat. (1991).

the permitted guidelines range,[2] but within the statutory maximum. O'Neill claims the trial court erred in relying upon a South Carolina "misdemeanor" conviction as one of the two convictions necessary to support an habitual offender sentence. We affirm the judgment and sentences in all respects.

Before a court may sentence a defendant as an habitual felony offender it must make a finding that the defendant has previously been convicted of two or more felonies in this state, or two or more other qualified offenses, within the last five years. § 775.084 (1)(a), Fla. Stat. (1991).[3] O'Neill argues that he did not meet the statutory criteria for being declared an habitual offender because one of the two convictions used to habitualize him, a South Carolina conviction for possession of cocaine, was labeled a misdemeanor by the South Carolina statute, which proscribes this offense.

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[2] *See* § 775.082, Fla. Stat. (1991). O'Neill concedes that his scoresheet totalled 275 points, placing him in a recommended range of 17 to 22 years and a permitted range of 12 to 27 years. The maximum statutory term of incarceration applicable to a second degree felony, absent habitual offender treatment, is fifteen years.

[3] Section 775.084(1)(a), Fla. Stat. (1991) provides:

> 1. The defendant has previously been convicted of any combination of *two or more felonies in this state or other qualified offenses;* [and]
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;...(emphasis supplied)

In support of this argument, O'Neill relies on a series of guidelines "scoring" cases under Florida Rule of Criminal Procedure 3.701 in which it has been held that scoring for "prior convictions" in a guidelines sentence should be at the same degree as existed for the offense at the time the convictions were imposed. *See Frazier v. State,* 515 So. 2d 1061, 1062 (Fla. 5th DCA 1987); *Roberts v. State,* 507 So. 2d 761 (Fla. 1st DCA 1987); *Johnson v. State,* 476 So. 2d 786 (Fla. 1st DCA 1985); *Pugh v. State*, 463 So. 2d 582 (Fla. 1st DCA 1985). However this rationale ignores the language of section 775.084. The cases cited by O'Neill rely on the Committee Note to Rule 3.701(d)(5), which directs that any uncertainties in scoring "prior record" in guideline sentences be resolved in favor of the defendant. Further, these cases involve *Florida* offenses, as opposed to out-of-state offenses, which have been modified to a different class or degree subsequent to the defendant's original conviction and sentence.

O'Neill's argument ignores the provisions of the statute which relate to "qualified offenses," and instead relies solely on the term "felonies." Under section 775.084(1)(a)1, it is clear that to habitualize a defendant there must be either two felonies committed in Florida *or* other qualified offenses. A "qualified offense" is defined under section 775.084(c) as:

> Any offense, substantially similar in elements and penalties to an offense in this state, which is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States, or any possession or territory thereof, or any foreign jurisdiction, that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year. (emphasis supplied)

Section 775.084(1)(c)'s definition of qualified offense makes *any* non-Florida conviction for an out-of-state offense with elements similar to a Florida felony offense and which provides for a penalty of

one year imprisonment, to death, available to impose an habitual offender sentence. The label given the out-of-state offense by the other jurisdiction is not controlling. Any other interpretation would render the inclusion of the provisions for qualified offense, meaningless.

A comparison between the South Carolina statute, section 44-53-370D,[4] and the comparable Florida statute, section 893.13(1)(f)[5], reveals the two statutes *are* substantially similar. For a first offense, section 44-53-370D(1) classifies possession of a Schedule II (cocaine)[6] controlled substance as a misdemeanor, but it provides for imprisonment for a period of up to two years. It also provides for a fine of $5,000. The statute increases in classification to a felony upon the commission of a

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[4] Section 44-53-370D, S.C. Code provides:

> (d) A person who violates subsection (c) with respect to
>
> (1) A controlled substance classified in schedule I (b) and (c) which is a narcotic drug lysergic acid, diethylamide (LSD) and in schedule II which is a narcotic drug is guilty of a misdemeanor, and upon conviction, must be imprisoned not more than two years or fined not more than $5,000 or both. For a second offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than five years or fined not more than five thousand dollars, or both. . . . .

[5] We reject O'Neill's contention that the comparable Florida statute is section 893.13(1)(g), violation of which is a misdemeanor in the first degree. O'Neill concedes that the subject of the South Carolina conviction was cocaine, and subsection (1)(g) proscribes the possession of *cannabis*, not cocaine. Possession of cocaine is proscribed by section 893.13(1)(f), which provides:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. (emphasis supplied)

[6] § 44-53-210, S.C. Code (1993).

second offense, and increases imprisonment to a possible term of five years. A third conviction triggers more serious sanctions. Possession must be knowing or intentional. The thrust of this statute is to classify the offense by the number of convictions, imposing more serious classifications as the number of convictions increase.

The Florida statute, section 893.13(1)(f), prohibits possession of a controlled substance, among which is cocaine, the offense for which O'Neill was convicted in South Carolina. Violation of this statute in Florida constitutes a felony of the third degree, and is punishable by a term of imprisonment not to exceed five years (section 775.082(3)(d)) and/or a fine of up to $5,000 (section 775.083(c)). Possession must be actual or constructive.

Viewed in light of the foregoing, we conclude the South Carolina conviction constitutes a qualified offense under Florida's habitual offender statute. In either South Carolina or Florida, possession[7] of cocaine subjects the perpetrator to imprisonment for more than one year, and a fine of up to $5,000. Moreover, the actual language of the two statutes is substantially similar, and in part, contains virtually identical language.[8] Pursuant to section 775.084(c), it is not necessary that

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[7] Although the South Carolina statute requires knowing and intentional possession, and the Florida statute requires actual or constructive possession, we can discern no substantial difference between the two. "Knowingly" means with actual knowledge and understanding of the facts. *Shaw v. State*, 510 So. 2d 349, 350 (Fla. 2d DCA 1987). In South Carolina the term "knowingly" has been defined to include not only actual knowledge, but also knowledge which should have been gained by reasonable inspection when the circumstances are such to put a reasonable person on inquiry: *i.e.*, constructive knowledge. *State v. Thompkins*, 263 S.C. 472, 211 S.E. 2d 549, 554 (S.C. 1975).

[8] Section 44-53-370D(1)(c) of the South Carolina statute provides:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from or pursuant to a valid prescription or order of, a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article.

the statutes mirror one another. The out-of-state conviction need only be "substantially similar" to section 893.13(1)(f) in elements and penalties. Although South Carolina has labeled this offense a "misdemeanor," it has imposed punishment which is equivalent to punishment for a felony in Florida.

The Florida Supreme Court has held that the habitual offender statute must be complied with strictly. *Massey v State*, 609 So. 2d 598 (Fla. 1992); *Reynolds v. Cochran*, 138 So. 2d 500 (Fla. 1962). The language in section 775.084 is clear and unambiguous in its intent to consider out-of-state convictions which are substantially similar to Florida felony offenses, in the same manner as the comparable Florida offense.

We find the South Carolina and Florida statutes to be substantially similar under 775.084, and we affirm the convictions and sentences below. However, because this is a case of first impression, and because of the doctrine of lenity in interpreting criminal statutes,[9] we certify as a question of great public importance[10] the following question to the Florida Supreme Court:

> MAY AN OUT-OF-STATE CONVICTION WHICH IS A MISDEMEANOR IN THAT STATE, BUT WHICH IS SUBSTANTIALLY SIMILAR TO A FLORIDA STATUTE IN ELEMENTS AND PENALTIES, BE DEEMED A "QUALIFIED

While section 893.13(1)(f) of the Florida statute reads:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice . . . .

[9] § 775.021(1), Fla. Stat. (1993); *Griffith v. State*, 654 So. 2d 936, 938 (Fla. 4th DCA 1995); *Helfant v. State*, 630 So. 2d 672, 673 (Fla. 4th DCA 1995).

[10] Fla. R. App. P. 9.030(a)(2)(v).

OFFENSE" UNDER SECTION 775.084 AND USED TO IMPOSE A HABITUAL OFFENDER SENTENCE?

AFFIRMED.

PETERSON, CJ., concurs.

COBB, J., concurs in part, dissents in part, with opinion.

COBB, J., concurring in part, dissenting in part.

I concur in the affirmance of the judgments and sentences of the trial court. I see no reason to certify a question that is answered by the unambiguous language of a statute, in this case, section 775.084(1)(c), Florida Statutes.