ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PETER D. DEVONEY,

Petitioner,

vs. CASE NO.: 88,[illegible]

STATE OF FLORIDA,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

The Petitioner was charged in an information with Count One of Driving Under the Influence Manslaughter in violation of Sections 316.193(1), 316.193(3)(a), (b)I and (c)(3), Florida Statutes (1993), with Count Two of Vehicular Homicide in violation of Section 782.071, Florida Statutes (1993), and with Count Three of Driving Under the Influence and Causing Serious Bodily Injury in violation of Section 316.193(3)(a), (b), and (c)(2), Florida Statutes (1993). (R.57-58) He was tried by a jury and found guilty of Counts One and Three. (R.136-138) Defense Counsel filed a Motion for New Trial alleging, among other things, that the trial court erred in denying Petitioner's Motion for Mistrial. (R140-141) A portion of the hearing on the Motion for New Trial was heard on January 23, 1995. At that time, Defense Counsel argued juror misconduct (T. 760, R.173) The testimony of Jury Foreman, John Isley, was presented. Additional testimony and argument regarding the Motion for New Trial was presented on February 17, 1995 and March 17, 1995.

Juror Isley testified that during the jury's deliberating, he recalled discussion of Petitioner's prior speeding infraction which they had been instructed to disregard. (T. 797) Isley recalled that a juror named "Bill" indicated that Petitioner possibly had a prior DUI. (T. 806). Isley also testified that there was discussion that the prosecuting attorney possibly asked the question on purpose so that the jury would know and not let someone with a prior bad driving record go free. (T. 806) Isley

further recalled a blonde lady discussing the Petitioner's speeding ticket. (T. 801) The remaining jurors testified that they did not recall any discussion of Petitioner's speeding ticket. (T. 826-827, 829-830, 846-847, 848-849, 850-851) Ultimately, the trial court granted the Petitioner's Motion for New Trial. (T. 889, R. 211-217)

The State of Florida then filed its Notice of Appeal with the Fifth District Court of Appeal. (R.221) After the submission of briefs and oral argument, the Court of Appeals issued its opinion reversing the trial court's order granting the Motion for New Trial. (SR 2-14) Petitioner then filed a timely Motion for Rehearing or in the Alternative to Certify this Cause to the Florida Supreme Court to be a Matter of Great Public Importance. (SR 15-17) The Respondent filed its Response to Motion for Rehearing. (SR 18-20)

Subsequently, the Fifth District Court of Appeal issues its Opinion on Motion for Rehearing certifying this cause to the Florida Supreme Court to be a matter of great public importance. (SR 21-22) The Petitioner then filed a timely Notice to Invoke Discretionary Jurisdiction of Supreme Court. (SR 24)

STATEMENT OF THE'FACTS

Just after midnight on October 3, 1993, Joseph Bruno and Judy Phillips were traveling eastbound on Interstate 4 in a black Nissan Maxima. (T. 22-23) They were in the middle lane when they were struck by a car that had crossed the median. (T. 24) Bruno sustained severe injuries and Phillips died as a result of the collision. (T. 26-29, 126, 176, 503)

Colleen and Daniel Terry were traveling eastbound on Interstate 4 in front of the Maxima at the time of the accident. (T. 32-33) Mr. Terry changed lanes to avoid the collision. (T. 34, 43, 44) The Terrys stopped to help. Colleen Terry indicated that it was her opinion that the Petitioner was under the influence of something. (T. 37) She also indicated she had no knowledge as to the extent of the injuries Petitioner may have sustained. (T. 40) She also never smelled the odor of alcohol on the Petitioner. (T. 41)

Davlin Acree was traveling westbound on Interstate 4 when she saw a white Corvette come up from behind her on the left. (T 53, 56) She testified that the Corvette went into the middle lane in front of her, then into the far right lane, passed one or two cars, got back into the middle lane and then into the far left lane. (T. 53) She further testified that the car went back into the middle lane, went down the road for awhile, then all the way back to the far left lane and left the highway spinning into the median. (T. 53) She saw the Corvette crash into a blue or black

car. (T. 53-54) Ms. Acree believed the Petitioner was traveling between 80 and 90 miles per hour. (T. 57)

Marguerite and Luis Rivera were traveling westbound on Interstate 4. They saw a Mazda RX-7 pass them on their right. (T. 71, 72, 102) They then saw a white Corvette traveling in the left lane at a high rate of speed. (T. 76, 104) Mrs. Rivera saw the Corvette attempt to pass the RX-7 and then lost control. (T. 77) Mr. Rivera stated that the Corvette slowed abruptly and may have hit the back of the black Mazda. (T. 103, 106) Following the accident, the Riveras stopped to render aid. Ms. Rivera went to the Corvette. She smelled alcohol in the Petitioner's vehicle but did not know who it came from. (T. 89) Luis Rivera did not smell alcohol in the Petitioner's vehicle. (T. 116)

Sashi Gore conducted the autopsy of Judith Phillips. (T. 120-121) Gore stated that the cause of death was a transection of the thoracic aorta resulting in shock due to blunt force to the upper abdomen. (T. 126)

Captain John Joliff of the Altamonte Springs Fire Department responded to the scene. (T. 130, 132) He indicated that he got within one and one-half feet from Petitioner's face and detected alcohol on his breath as well as bloodshot eyes. (T. 134) Joliff further indicated that the Petitioner's speech was not slurred. (T. 141) Officer Robert Tango questioned Petitioner at the hospital after he was read his Miranda rights. (T. 149-150, 152) He testified that Petitioner told him that he had began drinking about 3:30 that afternoon after golfing. (T. 153) He had

had four or five beers after golf. (T. 154) About 6 p.m. he drank one Rum and Pineapple and two shots of Jim Beam. (T. 154) About 9 p.m. he had another shot of Jim Beam and between 10:30 and 12:30 he had two more beers, one hot of Kahlua, and also about three cups of coffee. (T. 155) Officer Tango testified that Petitioner was a little slow in his speech and his eyes were bloodshot. (T. 155) Officer Tango did not recall Petitioner's speech being slurred. (T. 166)

Officer Fannin was also at the scene. (T. 175) He questioned Petitioner shortly after the accident and Petitioner told him that a white vehicle had cut him off. (T. 177) Petitioner then stated that maybe one of his tires had blown out. (T. 177, 178) Officer Fannin gave paramedic, Al Caballero, a blood draw kit to obtain a sample of Petitioner's blood. (T. 180) After the blood was drawn, Officer Fannin took the blood kit. (T. 184-185) Officer Fannin testified that Petitioner's eyes were bloodshot, he had to ask the same questions more than once, and Petitioner appeared confused. (T. 188) Officer Fannin stated he did not smell alcohol. (T. 188)

Paramedic Al Caballero responded to the accident. (T. 212-213) He talked with the Petitioner. The Petitioner told him that he had been drinking and that he was the driver of the Corvette. (T. 215, 216) Caballero noted that Petitioner moved very slowly, was quiet, and had bloodshot eyes. (T. 217) Caballero drew the blood sample from Petitioner using the blood draw kit provided to him and did not recall having any problems with the draw. (T.

224, 237) Caballero did not smell alcohol on Petitioner's breath. (T. 216) He also indicated that the Petitioner's bloodshot eyes could have been the result of a head iajury. (T. 230)

John Foskett was traveling westbound on Interstate 4 in front of Petitioner's vehicle. (T. 241, 244) He saw the Corvette lose control. (T. 242-243) There were no other cars around the Corvette or between him and the Corvette. (T. 244) Mr. Foskett did not smell alcohol on Petitioner. (T. 258-259)

Crime lab analyst, Gabrielle Meyer, determined Petitioner's blood alcohol level to be .11 percent. (T. 263, 301) She testified that if Petitioner's last drink was at 10:30 or 10:45, and the accident was at 12:30, his blood alcohol content would have had to have been .12 to .13 at the time of the accident. (%. 308) She further testified tat if the Petitioner's next to last drink was at midnight, his last drink was at 12:15 a.m., and the accident was at 12:30 p.m., she could not say what Petitioner's blood alcohol content was at the time of the accident. (T. 323)

Officer Ron Edwards examined the vehicles after the accident. (T. 358) He found no paint transfer (T. 363) He found no evidence that a tire had blown out prior to the accident. (T. 364) Traffic accident reconstruction expert, Walter Kennedy, calculated that Petitioner's Corvette was traveling at 85 miles per hour when it first began to slide. (T. 421-422)

Kim Swetich, a defense witness, **was** with Petitioner playing golf on the day before the accident. (T. 459) He testified that Petitioner had two beers during the golf game. (T 460) After

golf, they drove to a friend's house. Swetich stated that Petitioner drove conservatively. (T. 462) He did not think Petitioner ever went over the speed limit. (T. 462, 464) They bought one beer each from Goodings. (T. 463) They went to a Hooters Restaurant and drank two more beers. (T. 464) Swetich did not believe Petitioner was intoxicated when he last saw him. (T. 467)

Kevin Ingalls was the bar manager at Applebee's. (T. 475) Just prior to the accident, he saw the Petitioner in the bar. (T. 477-478) While he was in the bathroom, the Petitioner's friend ordered two Crown Royals on the rocks. (T. 479-480) Ingalls never saw Petitioner drink a Crown Regal. (T. 480) He did serve Petitioner a cup of coffee with a splash of Kahlua. (T. 481) It was his opinion that Petitioner was not under the influence of alcohol to the extent his normal faculties were impaired. (T. 483).

Dr. Cheryl Reynolds examined Petitioner in the emergency room. (T. 504) She did not detect alcohol on his breath or slurred speech. (T. 505-506) Dr. John Hirt saw Petitioner the next day. (T. 513-514) He found a hematoma on the back of Petitioner's head. (T. 516) Dr. Hirt diagnosed Petitioner were severe head trauma, a fractured ankle, chest well syndrome and a knee sprain. (T. 518) He believed that the head injury could have caused bloodshot eyes and slurred speech.

Corey Satterfield was in Applebee's on October 2, 1993 where he saw the Petitioner. (T. 544) Petitioner did not appear to be impaired. (T. 549) Lori Cannon was traveling on Interstate 4

westbound on the night in question and saw two cars drive past her at a high rate of speed. (T. 563) She stated that the first car was a white Corvette and the second was a maroon Corvette. They were about one and one-half feet apart. (T. 565-566) The white Corvette pulled over in front of her and the maroon car got behind it. (T. 566-567) The maroon car struck the white car and the white car went across the median. (T. 568-569) She did not stop to help. (T. 570)

Scott Knapp was a passenger in Petitioner's car. He testified that they both had a Vodka and pineapple at Petitioner's home. (T. 583) They went to Longhorn Steakhouse for dinner and had a beer with dinner. (T. 584, 585) After dinner they had coffee and a shot of Crown Royal. (T. 586) They then went to Applebee's. Petitioner had nothing alcoholic to drink. (T. 588) He stated that when they left Applebee's, the Petitioner drove the same as he had all night. (T. 587-588, 592) It was his belief that Petitioner's car was struck by another car. (T. 597, 612) It was Knapp's opinion that Petitioner was not impaired and that his last alcoholic drink was at Longhorn's about 10:15 or 10:30. (t. 604, 608)

SUMMARY OF ARGUMENT

Petitioner contends in Point I that the open discussion by the jurors during their deliberations in the cause of the Petitioner's prior speeding ticket, after being specifically instructed to disregard it, constitutes an "overt act" of jury misconduct. Further, the jury misconduct was not harmless. Therefore, Petitioner is entitled to a new trial.

ARGUMENT

I. DOES ONE OR MORE JURORS' DISCUSSION DURING THE COURSE OF JURY DELIBERATIONS, OF A MATTER ADDUCED DURING THE COURSE OF TRIAL BUT WHICH THEY WERE INSTRUCTED TO DISREGARD, CONSTITUTE AN OVER ACT OF MISCONDUCT THAT WARRANTS A NEW TRIAL?

The Fifth District Court of Appeal has certified this matter to this Honorable Court as being a matter of great public importance pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(a)(v) and has further asked this Court to answer the following question:

> DOES ONE OR MORE JURORS' DISCUSSION DURING THE COURSE OF JURY DELIBERATIONS, OF A MATTER ADDUCED DURING THE COURSE OF TRIAL BUT WHICH THEY WERE INSTRUCTED TO DISREGARD, CONSTITUTE AN OVER ACT OF MISCONDUCT THAT WARRANTS A NEW TRIAL?

The Petitioner requests this Court to answer the question in the affirmative and direct the Fifth District Court of Appeal to enter an opinion affirming the trial court's Order granting the Petitioner's Motion for New Trial.

As has been noted, Petitioner filed a Motion for New Trial following his convictions alleging five (5) grounds, one of which was that the trial court erred in denying his Motion for Mistrial. (R. 140-141) The initial hearing on the Motion for New Trial was held on January 23, 1995.

At this hearing, defense counsel indicated that the testimony that was to be offered related to Petitioner's contention that the trial court erred in denying Petitioner's Motion for Mistrial. (T. 794) Defense counsel then recalled for the trial

court the events that led up to and followed the Petitioner's Motion for Mistrial. During the cross-examination of defense witness, Kim Swetich, the prosecutor asked Swetich if he was aware that the Petitioner, in 1992, had a speeding ticket for going twenty (20) miles an hour over the posted speed. (T. 596) At that time, defense counsel moved for a mistrial. (T. 469) The trial court had the jury taken out of the courtroom. (T. T. 469) After argument, the trial court sustained Petitioner's objection but denied Petitioner's Motion for Mistrial. (T. 470). The trial court then instructed the jurors to disregard the question asked by the prosecutor. (T. 470-471)

After reciting these facts to the trial court, the Petitioner indicated that he was calling the jury foreman as a witness in the hearing on the Motion for New Trial who would testify concerning the fact that the jurors did take into consideration the reference to the Petitioner's speeding ticket during their jury deliberations. Therefore, Petitioner contended that the trial court should grant Petitioner's Motion for New Trial. (T. 794-795) Without objection by the State of Florida, the Petitioner then called the jury foreman, John Isley, to testify. (T. 795)

During Mr. Isley's sworn testimony, he indicated that there was discussion by a juror identified a "Bill" concerning the reference to the Petitioner's speeding infraction. (T. 799) Isley further testified that there **was** discussion by "Bill" that the Petitioner possibly had a prior DUI. (T. 806) Isley testified that

there was discussion that the prosecuting attorney possibly asked the question on purpose so that the jury would know and not let someone with a prior bad driving record go free. (T. 806) Isley also recalled a blond lady discussing the Petitioner's speeding ticket. (T. 801) Finally, Mr. Isley testified that he sought out defense counsel after the trial. (T. 802-803) Following Mr. Isley's testimony, the State asked that the other jurors be contacted for a full inquiry. (T. 813-814) This request was granted by the trial court. (T. 814)

At the second phase of the hearing on the Motion for New Trial conducted on February 17, 1995, the State objected to the further interviewing of jurors. (T. 822) The trial court allowed the interviews. William Pepe testified that he did not recall any discussion of the Petitioner's speeding ticket during the jury deliberations. (T. 826-827) Phyllis Loundsbury testified that she did not recall any discussion of the Petitioner's speeding ticket during the jury deliberations. (T. 829-830)

At the third phase of the hearing on the Motion for New Trial conducted on march 17, 1995, jurors Gaye Rader, Barbara Whittle, and Blanch Lloyd testified that they did not recall any discussions during the jury deliberations of the Petitioner's speeding ticket. (T. 846, 848-849, 850-851) John Isley again testified and reiterated his testimony of January 23, 1995. (T. 852-861) Following the testimony and argument, the trial court granted Petitioner's Motion for New Trial. (T. 889)

The question, therefore, is: Does the open discussions by the jurors during their deliberations of the Petitioner's speeding ticket, and of which they were instructed to disregard, constitute an overt act of misconduct that warrants the Petitioner receiving a new trial? Petitioner contends it does.

Although some of the testimony of John Isley may have related to his subjective thought process, it is clear that the jury's discussions of the Petitioner's prior speeding ticket constituted an "overt act". Jurors are allowed to testify about "overt acts which might have prejudicially affected the jury in reaching their own verdict." State v. Hamilton, 574 So.2d 124, 128 (Fla. 1991). To the extent an inquiry will elicit information about overt prejudicial acts, it is permissible. Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97, 99 (Fla. 1991).

Black's Law Dictionary, Fifth Edition, defines "overt" as

> Open; manifest; public; issuing in action, as distinguished from that which rests merely in intention or design.

The conduct of the jury during deliberations, as testified to by John Isley, certainly meets the definition of "overt". There was open public discussion by the jurors of Petitioner's speeding ticket.

In Powell v. Allstate Insurance Company, 652 So.2d 354 (Fla. 1995), this Court found that alleged racial statements made by some of the jurors constituted sufficient "overt acts" to permit the trial court's inquiry and action. In this matter and in Powell, Id., improper discussions were had by jurors during their

deliberations. The only difference is in Powell they were racial statements and in this matter they were discussions about the Petitioner's post speeding ticket which they had been told specifically to disregard and which they did not.

In Wilding v. State of Florida, 675 So.2d 114 (Fla. 1996), there was open discussion amongst jurors that they feared that Wilding may have access to their personal information. This Court indicated, citing Powell, supra. and Hamilton, supra., that "[a]ny inquiry into juror misconduct must be limited to objective demonstration of overt acts committed by or in the presence of the jury or jurors which reasonably could have affected the verdict." The Court further stated at page 118 that "... a discussion among jurors about their fear that the defendant may have access to their personal information is an "overt act" that may be a proper subject of inquiry." Finally, this Court indicated at page 118

> Like racial bias, if an individual juror fears that the defendant might have access to the juror's personal information, which concern inheres in the verdict and is not the subject of inquiry. However, when such concern is discussed by jurors or otherwise openly brought to the attention of other jurors, the concern becomes an overt act of misconduct that may be inquired into. Powell, 656 So.2d at 357. As in any case dealing with jury misconduct, proper inquiry is limited to objective facts, such as whether the matter was discussed by or brought to the attention of other jurors, when this occurred, and the number of jurors involved.

In this matter and in Wilding, improper discussions were had by jurors. The only difference is in Wilding they were statements concerning the juror's fears that the defendant may have access to their personal information and in this matter there were discussions about the Petitioner's past speeding ticket which they had been told specifically to disregard and which they did not.

In reading the Powell decision, it appears that if one or more jurors in that case had thoughts of racial prejudice, but it was never discussed, the racial prejudice would have inhered in the verdict. It was the discussion of racial prejudice that made it an "overt act". In readying the Wilding decision, it appears that if one or more jurors in that case had thoughts of fear that the defendant may have access to this personal information, but it was never discussed. The fear would have inhered in the verdict. It was the discussion of the fear that made it an "overt act". In this matter, had one or more of the jurors just thought about the Petitioner's prior speeding ticket, Petitioner would concede that the thinking about it would inhere in the verdict. But, when the jurors began discussing it, just as in Powell and Wilding, it became an "overt act". Therefore, the jurors' discussions of Petitioner's prior speeding ticket, after being instructed to disregard it, constituted an "overt act" of jury misconduct that warrants a new trial.

In the Powell case, this Court, citing Maler v. Baptist Hospital of Miami, Inc., 559 So.2d 1157 (Fla. 3rd DCA 1989), stated at page 356

> Similarly, any receipt by jurors of prejudicial non-record information constitutes an overt act. Accordingly, it is subject to judicial inquiry even though the inquiry may not be expanded to ask jurors whether they actually relied upon the non-record information in reaching their verdict. Hamilton. As Judge Hubbart correctly suggested in the opinion under review, the case law on this topic allowed inquiry only into the objective acts committed by or in the presence of the jury or a juror that might have compromised the integrity of the fact finding process. Maler, 559 So.2d at 1162 (citing Russ, Marks) accord Hamilton.

In this cause, the Assistant State Attorney questioned a defense witness about the fact that Petitioner had a prior speeding ticket. The Court instructed the jury to disregard the questions and to disregard any consideration of the speeding ticket. Since it was to be disregarded, it was "nonrecord information". Consequently, the jurors' discussions of Petitioner's prior speeding ticket, which was "nonrecord information", after being instructed to disregard it, constituted an "overt act" of jury misconduct that warrants a new trial.

In Smith v. State, 95 so.2d 525 (Fla. 1957), the presence of a dictionary in a jury room required reversal of the verdict. In Weber v. State, 501 So.2d 1379 (Fla. 3rd DCA 1987), the jury learned from an extrinsic source that Weber had been previously convicted and sentenced to prison for the same crime for which he was on trial. This required a new trial. In Bailey v. State, 465 SE2d 284 (Ga. App. 1995), the trial judge was unable to disregard

evidence he ruled inadmissible. This required a new trial. Certainly, if the receipt of the nonrecord information in these three (3) cases dictated a reversal of the convictions and the granting of new trials, then the receipt of the "nonrecord information" in this cause concerning Petitioner's prior speeding ticket constituted an "overt act" of jury misconduct that necessitates the Petitioner receiving a new trial.

In Baptist Hospital of Miami, Inc., supra. at page 100, this Court stated

> ... Any actual, express agreement between two or more jurors to disregard their oaths and instructions constitutes neither subjective impression nor opinion, but an overt act . . .

In this cause, based on the testimony of juror, John Isley, he and one or more other jurors agreed to disregard their instructions (to disregard any reference to Petitioner's prior speeding ticket). This constituted an "overt act" of jury misconduct that warrants the Petitioner receiving a new trial.

The Petitioner contends that for the reasons argued in this Brief, he has established that the jurors' discussions regarding his prior speeding ticket, after being instructed to disregard it, constituted an "overt act" of jury misconduct. Petitioner also believes that this misconduct warrants him receiving a new trial.

According to Hamilton, supra., at 129, citing U.S. v. Howard, 506 F2d 865, 869, the inquiry

> ... must be limited to objective demonstration of extrinsic factual matter disclosed in the jury room. Having determined the precise quality of jury breach, if any, the [trial] court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant . . . Though a judge lacks even the insights of a psychiatrist, he must reach a judgment concerning the subjective effects of objective facts without benefit of couch-interview introspections. In this determination, prejudice will be assumed. In the form of a rebuttable presumption, and the burden is on the government to demonstrate the harmlessness of any breach to the defendant.

Stated another way, the question is whether or not the "over acts" reasonably could have affected the verdict" so as to warrant a new trial. See Wilding, supra., at 118. The Petitioner is entitled to a new trial unless the Respondent can demonstrate that there was no reasonable possibility that the jury misconduct affected the verdict.

The case of State v. Diquilio, 491 So.2d 1129 (Fla. 1986) discusses in great detail the harmless error rule. The harmless error rule places the burden on the State, as the beneficiary of the effor , to prove beyond a reasonable doubts that the error complained of did not contribute to the verdict. DiGuilio further indicates at 1138 that

> Application of the test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which

might have possibly influenced the jury verdict.

In this matter, the Respondent did not prove beyond a reasonable doubt that the discussions concerning the Petitioner's past speeding infraction did not influence the verdict. Colleen Terry never smelled the odor of alcohol on the Petitioner. (T. 41) Marguerite Rivera, who smelled alcohol in Petitioner's vehicle, did not know who it came from. (T. 89) Luis Rivera did not smell alcohol in the Petitioner's vehicle. (T. 116) Captain John Joliff indicated that the Petitioner's speech was not slurred. (T. 141) Officer Robert Tango did not recall noting alcohol on the Petitioner's breath. (T. 163) Tango also did not note that the Petitioner's speech was slurred. (T. 166) Officer Chris Fannon did not smell alcohol on the Petitioner's breath. (T. 188)

Paramedic Al Caballero did not smell alcohol on the Petitioner. (T. 216) Caballero also indicated that the Petitioner's bloodshot eyes could have been the result of a head injury. (T. 230) John Foskett did not smell alcohol on the Petitioner. (T. 258-259)

Crime Lab Analyst Cabrielle Meyer testified that if Petitioner's next to last drink was at 12:00 midnight, his last drink was at 12:15 a.m. and the accident was at 12:30 p.m., she could not say what the Petitioner' blood alcohol content was at the time of the accident. (T. 323)

Kim Swetich indicted Petitioner was not under the influence of alcohol when he last saw him. (T. 467) Kevin Ingalls did not believe that the Petitioner was under the influence of

alcohol when he saw him just prior to the accident. (T. 483) Corey Satterfield also did not feel that the Petitioner was under the influence of alcohol when he saw him just prior to the accident. (T. 549) Scott Knapp did not believe that the Petitioner was under the influence of alcohol. (T. 604)

Emergency room physician, Cheryl Reynolds, who treated the Petitioner just after the accident, did not detect alcohol on his breath or slurred speech. Dr. John Hirt, who treated the Petitioner one to two days after the accident, found that the Petitioner had suffered severe head trauma. (T. 518) He also testified that the head trauma could have caused the Petitioner's bloodshot eyes.

Based upon all of the evidence presented at the trial, along with the fact that the jury considered the reference to the Petitioner's past speeding infraction any may have even speculated as to whether or not the Petitioner had a prior DUI, there is a reasonable probability that the jury misconduct affected the verdict. If the Appellate Court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. DiGuilio, supra. at 1139. In this matter, the jury misconduct was harmful and warrants the Petitioner receiving a new trial.

Therefore, for the reasons stated, this Honorable Court should answer the certified question in the affirmative, rule that the jurors' discussion of the Petitioner's speeding ticket during their deliberations, despite being instructed to disregard it,

constitutes an overt act of misconduct that warrants the Petitioner receiving a new trial, and direct the Fifth District Court of Appeal to enter an opinion affirming the trial court's Order granting the Petitioner's Motion for New Trial.

CONCLUSION

For the reasons stated in Point I, this Honorable Court should answer the certified question in the affirmative, and direct the Fifth District Court of Appeal to enter an opinion affirming the trial court's Order granting the Petitioner's Motion for New Trial.

Respectfully submitted,

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