IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1355

RAUL MORALES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT

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INTRODUCTION

Respondent, the State of Florida, was the prosecution in the trial court, Appellee before the Third District Court of Appeal, and will be referred to herein as the State. Petitioner was the defendant in the trial court, the Appellant on appeal to the Third District Court of Appeal, and will be referred to herein as Defendant. The symbol "R" denotes the record on appeal. The trial minutes of the proceedings below will be denoted by the letter “T.”

STATEMENT OF THE CASE

Defendant was charged by Amended Information filed on August 13, 1999 with one count of boating under the influence manslaughter and one count of vessel homicide for the death of Hubert Jaurequi committed on September 27, 1998. (R3-4). Defendant was convicted of both counts by jury verdict rendered on December 2, 1999. (R92). Defendant was sentenced on February 14, 2000, to 207 months for boating under the influence and had the other count resulting in a suspended sentence. (R109-111,118-120,129-130). Defendant timely appealed the conviction to the Third District Court of Appeal on February 14,

2000. (R128).

The Third District Court of Appeal affirmed in part by affirming the boating under the influence manslaughter count and sentence imposed thereon and vacating the vessel homicide count. Morales v. State, 785 So.2d 612 (Fla. 3d DCA 2001). The Opinion was rendered on April 25, 2001 and Rehearing was timely requested on May 9, 2001 and was denied on May 30, 2001. A mandate issued on June 15, 2001. Defendant invoked jurisdiction on this Court on or about June 15, 2001. This Court accepted jurisdiction on November 20, 2001.

STATEMENT OF FACTS

The testimony presented at trial revealed the following facts. Iovana Posada testified that she recalled an incident occurring in the MacArthur Causeway in Dade County in September of 1998. (T255-256). Posada observed two jet skiers in the water approximately ten feet apart and a boat tried to make it between the two but hit one of the skiers. (T257). The boat was in a no wake zone and a designated manatee area or zone. (T261,265).

Posada testified that the jet skiers were idle and sitting in the water. (T261). The boat hit the jet skier fairly close to the shore. (T262). Posada observed the jet skier thrown off

the jet ski and saw the other skier jump into the water to help the injured party. (T262-263). Posada could see a pool of blood in the water. (T262-263). The boat continued eastward and did not slow down. (T264). The injured man was brought to shore and his eyes eventually closed. (T267). Posada observed an open gash on the back of the injured man. (T268). Posada called 911 and reported the incident and later observed Defendant getting off of a Coast Guard boat. (T279-281).

Leudelis Alvarez testified that Hubert Jaurequi was the best friend of her husband. (T286). She was present when Hubert was killed in the subject marina off the MacArthur Causeway headed toward Miami Beach. (T287). She was at the site on the day of the incident to ride jet skis. (T289). Alvarez witnessed Hubert being hit by a two passenger boat. (T293). Before the accident, she saw the boat riding fast and just prior to the collision it approached fast. (T294,296). The boat was moving west to east and was south of the manatee sign and moving at about 50 miles per hour. (T296-297). Hubert was not moving at all. (T297). The boat struck Hubert and then went out to deeper water and never slowed down. (T298).

Alvarez testified that the boat never attempted to swerve in order to avoid striking Hubert. (T298). Alvarez observed the impact and stated that Hubert was thrown in the air and then

his body went under water, but he came up because he was wearing a life vest. (T302). Alvarez later saw a man with long curly hair in water near the shore placing salt water in his mouth and he could hardly stand up straight. (T302-303).

Osmel Fernandez testified that he was the husband of Alvarez and that he knew Hubert for 18 years and was present when he was killed. (T319-320). Hubert was on his jet ski when Fernandez saw a boat coming from inside the manatee sign and headed for Hubert at about 50 miles per hour. The boat hit Hubert and continued moving. (T322-323). Fernandez further noted that the boat never slowed down and went straight at Hubert. (T327).

About ten minutes later, Fernandez saw the boat at shore. (T328). The driver of the boat had long curly hair and a mustache. (T329). Fernandez noted that the driver of the boat could not stand and his breath smelled like alcohol and Fernandez observed him putting salt water in his mouth. (T330-331). The eyes of the driver were also red and his voice was not clear when he asked what happened. (T330,333). Fernandez punched the driver in the face, neck, and back. (T330).

Fernandez further testified that Hubert had a bad cut on his back and he was swimming with one hand after the accident screaming for help. (T336-337).

Rodimus Lamenza, a machinery technician with the United

States Coast Guard testified that he investigated the subject boating fatality on September 27, 1998. (T361-362). The area of the fatality was the Japanese Gardens north of the MacArthur Causeway. (T362). Lamenza's ship was the second Coast Guard vessel to arrive at the scene, and upon arrival of Lamenza's vessel, Defendant was transferred to his ship. (T364-366). Defendant was transported to the Coast Guard station nearby. (T367). Lamenza then served as an interpreter for the Defendant. (T368).

Lamenza noted that Defendant had trouble walking at the pier and two officers, one on each side, had to assist him. (T367-368). Lamenza translated a request by Officer Ludwig that Defendant submit to a field sobriety test and Defendant agreed to do so. (T369-370). Lamenza testified that Defendant failed one, or maybe more, of the field sobriety tests. (T371). Lamenza further noted that Defendant had slurred speech. (T372).

Lamenza also administered Miranda warnings when asked to translate. (T371). A signed Miranda waiver was thereafter obtained at approximately 9:58 p.m. (T372-375,398). Defendant then gave a written statement. (T376).

Officer Anthony Ludwig, also of the United States Coast Guard, testified that he is trained to administer field sobriety

testing for boating under the influence cases. (T404-405). Ludwig also investigated the September 27, 1998 boating fatality. (T406). Ludwig was called to the area between the MacArthur and Venetian Causeways at approximately 4:15 p.m. (T407). Ludwig arrived on his vessel at 4:25 p.m. and a smaller Coast Guard vessel was already present. (T408).

Ludwig testified that Defendant was transferred from the other Coast Guard vessel to his ship. (T411-412). Ludwig further noted that Defendant had a strong alcohol odor on his breath and his eyes were bloodshot and he had a sleepy demeanor. (T412). Ludwig also stated that he boarded Defendant's vessel and that vessel had a very overpowered engine size for that type of boat. (T415).

Ludwig's vessel transported Defendant back to the Coast Guard station and they arrived at about 5 p.m. (T417). Officer Lamenza translated for Defendant and Defendant agreed to perform a series of field sobriety tests. (T418). Ludwig opined that Defendant was under the influence and impaired by alcohol based on the conduct of the field sobriety tests and the fact that Defendant's eyes were bloodshot, his face flushed, and the strong odor of alcohol on his breath. (T427-428,483-484).[1]

[1]For instance, Ludwig noted that Defendant did not perform either the Finger Count or Palm Pat tests as he counted improperly for both. (T426). Defendant also failed the

Ludwig further testified that Defendant noted in his statement that his boat was traveling from west to east and he moved closer to land because a boat full of girls was approaching close to his boat. The next thing that Defendant knew, a jet ski jumped in front of him and he hit the skier. Defendant then made it to the beach and was attacked by people. (T481).

Alexander Roman testified that he was an Emergency Room Technician in September of 1998. (T485). Roman performed a blood draw from a person brought to South Shore Hospital by Officer Curt Kaloostian of the Florida Marine Patrol. (T486-488). Roman was certified to perform such blood draws and utilized a test kit supplied by Kaloostian. (T488-489). Defendant's name was on the documents showing the blood draw and Roman noted that the person whose blood was drawn had the smell of alcohol on his breath and was under the influence of alcohol. (T490-492).

George Borghi testified as a stipulated expert in fiber analysis. (T495,497). Borghi received a purple life vest and two containers of Phillips head screws and a vinyl sample from

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Finger to Nose test as he missed his nose a couple of times and also used the wrong hands when instructed by Ludwig. (T426). Defendant swayed during the Walk and Turn test and took 10 steps rather then 9. (T427). Defendant also swayed and put his foot to the ground during the One Leg Stand test. (T427).

a water craft seat. (T498). Borghi opined that fibers from the life vest matched material that was embedded in each screw. (T504-505). Borghi also opined that nothing from the vinyl seat was consistent with being embedded in the screws. (T505).

Richard McClure testified as a stipulated expert in forensic toxicology. (T507). McClure testified that he utilized gas chromatography to test for blood alcohol. (T508). McClure noted that different compounds move through the chromatograph at different rates and then form bands as they exit the column so that they can be measured. (T508-509). The measuring units for alcohol content are in grams of ethanol per deciliter of blood. (T509). Analysis of Defendant's blood was performed via gas chromatography. (T509-510). McClure received a sealed kit from Officer Kaloostian and McClure removed two vials of blood from the kit in separate packages. (T511-512).

Defendant interposed an objection under Florida Administrative Code, Rule 11D-8.012 and noted only that there was no testimony that the tubes containing the blood contained anticoagulants. (T512-513). McClure testified that the vials contained anticoagulants and noted that the manufacturer places anticoagulants in the vial. (T514-516). McClure testified that the blood was contained in gray stopper vials in a collection kit, sealed in a heat sealed pouch. (T511). McClure noted that

the blood was in liquid form due to anticoagulants contained in the gray stopper vials that kept the blood from clotting or clumping together. (T514). McClure testified that he knew that the vials had anticoagulants in them because the manufacturer places it in the gray stopper, and the blood remained in liquid form and did not clot or clump together even a year later. (T514-516). In fact, the blood would have clotted or clumped together if the vials did not contain anticoagulants, according to McClure. (T514). The Circuit Court overruled Defendant's sole objection based upon the lack of anticoagulants in the test vials. (T517).

McClure then noted he conducted four readings and he reported the lowest of the readings. (T519). The readings here were .0749, .0723, .0753, and .0726. (T519). The lowest reading was then reported at .072. (T523).

Curt Kaloostian, an investigator with the Florida Marine Patrol, testified that he had undertaken ten investigations in his career for vessel homicides. (T531-532). Kaloostian investigated the subject fatality occurring on September 27, 1998 at about 4:14 p.m. in the area between the Venetian and MacArthur Causeways in North Biscayne Bay. (T533-534). The accident occurred at low tide. (T535). Kaloostian had no contact with Defendant at the scene because he had already been

taken to the Coast Guard Station when Kaloostian arrived at the scene. (T536).

Kaloostian testified that the manatee zone sign was 61 feet from shore at low tide. (T534,537). Kaloostian further noted that jet skiers are permitted in the manatee zone. (T537).

Kaloostian identified Defendant at trial and stated that he eventually went to the Coast Guard base. (T538). Kaloostian could smell the odor of alcohol on Defendant and he took Defendant to South Shore Hospital for a blood draw. (T539-540). Kaloostian witnessed Alexander Roman conduct the blood draw with a kit that Kaloostian provided. (T541). Kaloostian witnessed Roman sign the blood draw certificate and the draw was completed at 6:50 p.m. (T541,547). Kaloostian returned to the Coast Guard base with Defendant and asked Defendant to make a statement. (T548-549).

Kaloostian utilized Officer Lamenza of the Coast Guard to translate and a written Miranda waiver was obtained from Defendant. (T550). Defendant said that he got the bridge and then headed to Japanese Gardens at a speed of between 45 to 50 miles per hour. There were two jet skiers on his left and two others on his right. One male jet operator then cut in front of his boat and he hit him. (T552-553). Defendant further stated in this statement that he knew the speed of his vessel from the

sound of his engine and that he was traveling at 48 to 49 miles per hour when he hit the jet skier. Defendant acknowledged that he knew about the manatee sign and said that he made a mistake. Defendant further stated that he had a six pack of Heineken Beers on board and that he had consumed three beers. (T554). Defendant signed the written statement which was set forth in Spanish. (T555).

The translated statement was read to the jury as well. (T556). It indicated that Defendant was coming from the Seaquarium and had consumed three beers at an island. He returned and crossed the bridge and two jet skiers were on both sides and he felt the impact of one at 35 miles per hour. Defendant was traveling at 49 miles per hour and he stated that "I know I made a mistake" and acknowledged that the sign meant no speed. (T556-557). Both the State and Defendant stipulated to the accuracy of the translation read to the jury. (T557-558).

Kaloostian further testified that he impounded the life vest worn by the victim. (T560). Kaloostian also retained a sample of the seat from the boat. (T5660. Kaloostian also observed that 2 phillips head screws in the hull of Defendant's boat had purple fibers embedded inside the screw heads. Kaloostian removed the screws and transmitted them to the Metro Dade Police

Laboratory. (T576-577).

Leonardo de Guzman also testified and stated that he witnessed the subject collision. (T631-632). De Guzman was on the beach at the time of the accident and he saw the boat hit the jet skier. (T634,638). De Guzman testified that the boat was traveling fast and that the boat was not cut off and no one veered into its path. (T639,642-643). No jet skiers were jumping wakes from boats and de Guzman heard a loud bang and the victim was in the water in a dark pool of blood. (T643). The victim was not in motion when he was hit. (T647).

Chip Walls, an expert in forensic toxicology, also testified. (T661,665). Walls opined that it is possible for someone to be impaired by alcohol at levels of less than .08. (T667). Walls further opined that field sobriety tests are good indicators to determine impairment by alcohol. (T672). Walls opined that it takes three and one-half to four drinks for a 180 pound individual to possess a blood alcohol level of between .07 and .075. (T676). Walls also opined that if a person has a .07 blood alcohol level two and one-half hours after a collision, it is not consistent with that person having consumed only three beers prior to that collision. (T681). In fact, Walls opined that it would be expected that such a person would have had to consume 6 drinks to have a .07 blood alcohol level at 6:50 p.m.

assuming that the collision occurred at 4:15 p.m. (T682-683).

Dr. Ray Fernandez, a Medical Doctor in the Dade County Medical Examiner's Office testified that the victim was pronounced dead at Jackson Memorial Hospital. (T717,721). Dr. Fernandez conducted the autopsy and noted that the victim was a 5'10" male of 27 years of age and weighing 256 pounds. (T722). The victim had a fracture of the right upper arm and the right side of his back had a gaping, open laceration as well as liver and kidney lacerations and fractures to the 11th and 12th ribs. (T723-724). Dr. Fernandez opined that there were forceful injuries to tear the right kidney and the liver and lining up with the gaping hole in the victim's back. (T733). Dr. Fernandez opined that the bow of the Defendant's boat could have caused those injuries. (T734). Dr. Fernandez opined that the cause of death was multiple blunt force injuries and the manner of death was an accident. (T737).

As previously noted, the jury returned a verdict convicting Defendant of both counts. (R92). Defendant was sentenced to 207 months for the boating under the influence count and a suspended sentence for the other count. (R109-111,118-120,129-130). The Third District Court of Appeal affirmed the boating under the influence manslaughter conviction and vacated the vessel homicide conviction. Morales v. State, 785 So.2d 612

(Fla. 3d DCA 2001). This Court accepted jurisdiction of the case by Order entered on November 20, 2001. This appeal follows.

POINTS ON APPEAL

I. WHETHER THERE IS REVERSIBLE ERROR IN INSTRUCTING THE JURY ON THE STATUTORY PRESUMPTION OF IMPAIRMENT BASED UPON THE BLOOD TESTS CONDUCTED HEREIN?

II. WHETHER THERE WAS AN ABUSE OF DISCRETION IN THE RULING OF THE CIRCUIT COURT PERMITTING THE BLOOD ALCOHOL TESTS TO BE ADMITTED INTO EVIDENCE WHERE THE ONLY OBJECTION RAISED BELOW WAS PREDICATED UPON THE PURPORTED LACK OF ANTI-COAGULANTS IN THE SUBJECT VIALS CONTAINING THE BLOOD?

III. WHETHER THERE IS REVERSIBLE ERROR IN THE JURY INSTRUCTIONS OF THE CIRCUIT COURT PERTAINING TO READ BACK OF TESTIMONY?

SUMMARY OF THE ARGUMENT

There is no reversible error flowing from the jury instruction on the statutory presumption of impairment based upon the blood tests conducted in this case. The purported error is unpreserved for review on appeal because there was no attack upon the subject administrative Rule that this Court addressed in State v. Miles, 775 So.2d 950 (Fla. 2000). This being the case, this Court improperly granted jurisdiction to hear this appeal and review should be denied on this basis alone. Additionally, the only challenge to the administrative Rule made in the Circuit Court below was raised with respect to

the purported failure to utilize anticoagulants in the vials containing the blood. The record evidence presented from both the toxicologist (McClure) and Officer Kaloostian, established the necessary predicate supporting the fact that anticoagulants were contained in the vials. Moreover, the record evidence establishes that the blood alcohol level of Defendant was .072, less than the statutorily presumptive level of .08, the level upon which the jury could have made a finding of impairment based solely on the blood test results. Because the State presented compelling and other overwhelming proof of Defendant's impairment separate and apart from the blood alcohol test level of .072, any conceivable error is harmless beyond a reasonable doubt.

Finally, there is no error in the Circuit Court's jury instruction about reading back testimony. The Circuit Court, while never expressly presented with a direct request for a read back by the jury, did issue preliminary and closing instructions that the jury could have testimony read back if they desired it, but that the process might be difficult and time consuming. The Circuit Court never instructed the jury that they could not have testimony read back.

ARGUMENT

I. THERE IS NO REVERSIBLE ERROR IN INSTRUCTING THE JURY ON THE STATUTORY PRESUMPTION OF IMPAIRMENT BASED ON THE BLOOD TESTS CONDUCTED HEREIN.

Defendant contends that the Circuit Court erred in instructing the jury on the statutory presumption of impairment based upon alcohol test results under Rule 11D-8.012. The State submits that this issue is both unpreserved and without merit. In the alternative, any error is clearly harmless.

The standard of review on appeal for matters pertaining to jury instructions is that of abuse of discretion. James v. State, 695 So.2d 1229 (Fla. 1997). The basis of Defendant's argument here is that the Circuit Court erred in instructing the jury on the statutory presumption of impairment because the test results were obtained in purported contravention of Florida Administrative Code Rule 11D-8.012.

It should be noted that the State initially submits that this issue is unpreserved for review on appeal. Unlike the defendant in State v. Miles, 775 So.2d 950 (Fla. 2000), Defendant here never challenged the adequacy of Rule 11D-8.012. Rather, Defendant merely argued that the State did not adequately establish a predicate to support the admissibility of

the blood alcohol test results because anticoagulants were not purportedly utilized in the blood vials. In fact, the Third District Court of Appeal made this same point in footnote 1 of its Opinion. Morales v. State, supra, n.1. This was the only objection registered in the Circuit Court below. (T512-514). It is significant to note that no suppression motion was ever filed to challenge the scientific reliability of the subject Rule now argued as such, in direct contrast to the defendant in Miles. Because Defendant failed to preserve the issue for review, there is no direct and express conflict with Miles appearing on the four corners of the Opinion of the District Court of Appeal. As such, there is no jurisdiction to hear the appeal based upon express and direct conflict jurisdiction. See, Reaves v. State, 485 So.2d 829,830 (Fla. 1986). As such, the Court herein should decline to review the matter and merely note that review was improvidently granted.

There is no merit to the contention that the test results were improperly admitted on the basis that there was an insufficient predicate to establish that anticoagulants were properly administered. See infra, Point II. This being the case, there was simply no error in the admission of the blood alcohol evidence here.

Finally, there can hardly be any real contention that even

if the evidence were improperly admitted under Rule 11D-8.012, that the error is anything but harmless under Goodwin v. State, 751 So.2d 537 (Fla. 1999). First, of course, the statutory presumptions under the implied consent law for boating vessels flows from Section 327.354, Fla. Stat.(1997).[2] Moreover, when the jury was instructed, again without objection from Defendant[3] (T839), the jury was instructed that if they found that defendant had a blood alcohol level in excess of .05 but less than .08 they could consider that evidence in conjunction with other competent evidence to determine the issue of impairment. (T842). In light of the fact that the evidence of Defendant's blood alcohol level was at .072, the jury had to make the impairment determination on the basis of other competent evidence in addition to that test result.

For example, there was clearly record support for the admissibility of the evidence under a common law impairment theory outlined in Robertson v. State, 604 So.2d 783,789 (Fla.

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[2]All of the parties to the appeal (including the predecessor attorney for the State in the District Court of Appeal)argued that the implied consent presumptions emanated from Section 316.1934(2), Fla. Stat.(1997). That section, however, deals with motor vehicles. Section 327.354 referenced above is applicable to boating vessels, but the analysis still calls for compliance with FDLE methods and the analytic framework is the same as 316.1934.

[3]The error is thus unpreserved for review under this theory as well. Brooks v. State, 762 So.2d 879 (Fla. 2000).

1992) inasmuch as the State established that (1) the test was reliable; (2) the test was performed by a qualified expert; and (3) expert testimony was presented to establish the meaning of the results. McClure was a stipulated toxicology expert so he was certainly qualified to perform the blood test. The test was taken with gas chromatography and no objection was registered to challenge such equipment or that of its reliability by way of a Frye hearing or any other objection for that matter. Both McClure and Walls opined about the meaning of the test results. True, the State would not be entitled to a presumption under a common law impairment admissibility theory outlined in Robertson. State v. Miles, supra. However, there was no real presumption created from a material harmless error analysis theory because the blood test results were less than .08. This means, of course, that the jury had to make a finding of impairment on the basis of proof in addition to the blood test results. In other words, this Court can readily conclude that common law proof of impairment was the record basis for the assessment of guilt by the jury.

This Court can be convinced of the harmless error analysis set forth by the State on the basis on the other proof supporting impairment in the record and pointing to guilt. First, four witnesses saw the boat strike the victim while the

boat was traveling fast and the victim was idle in the water. These witnesses were Posada (T262-264), Leudelis Alvarez (T296-297), Osmel Fernandez (T322-323), and Leonardo de Guzman (T647). George Borghi, the stipulated fiber expert opined that fibers from the victim's life vest were embedded in both Phillips head screws removed from Defendant's boat. (T498,504-505). Officer Ludwig testified that Defendant failed five field sobriety tests. (T426-427). Ludwig opined that Defendant was impaired by alcohol based upon the field sobriety tests and bloodshot eyes, strong odor of alcohol and a flushed face. (T483-484). Other witnesses could smell alcohol odor on Defendant's breath including Officer Kaloostian (T539), Technician Roman, who conducted the blood draw two and one-half hours later (T490-491), and Osmel Fernandez (T330-331). In fact, Fernandez noted that Defendant's eyes were red and that he kept putting salt water in his mouth at the scene of the accident. (T330-331). On top of all of this, Defendant provided a voluntary statement to the authorities where he admitted that he was traveling at 49 miles per hour in a no speed zone and that he made a mistake. (T556-557).

In light of all of these facts to support common law impairment, coupled with the point that the blood alcohol test revealed a limit below .08 (and that would have independently

supported a jury finding of impairment without resort to other evidence under the complained of instruction) any error is clearly harmless beyond a reasonable doubt.

II. THERE WAS NO ABUSE OF DISCRETION IN THE RULING OF THE CIRCUIT COURT PERMITTING THE BLOOD ALCOHOL TESTS TO BE ADMITTED INTO EVIDENCE BASED UPON THE TESTIMONY PRESENTED ABOUT THE ANTICOAGULANTS.

Defendant also contends that the Circuit Court erred because there was not a factual predicate to support the admissibility of the evidence under Florida Administrative Code Rule 11D-8.012 because there was no proof that the samples were preserved properly with adequate anticoagulants. This argument, while preserved below, is without merit, or alternatively, is harmless.

The standard of review on appeal for the admissibility of evidence is that of abuse of discretion. Ray v. State, 755 So.2d 604,610 (Fla. 2000). No such abuse can be demonstrated

here.

McClure testified that the blood vials that he received were contained in gray stopper vials in a sealed blood kit. (T511). McClure opined that the blood was in liquid form and clearly contained anticoagulants because otherwise the blood would have clumped together or clotted. (T514). McClure also noted that he knew that the vials contained anticoagulants because the manufacturer places it in the gray stopper, and the blood remained in liquid form and did not clot. (T514-516). Officer Kaloostian testified, without objection, that when he opened up the sealed box, the empty vials contained a blood preservative. (T543-544). These facts contain ample record support to establish that the samples contained both anticoagulants and proper preservatives. There was, therefore, no abuse of discretion in admitting this evidence based upon this one specifically preserved argument.

In the alternative, should the Court conclude that there was not sufficient compliance with Rule 11D-8.012 based upon the lack of anticoagulants or preservatives in the blood samples, the error is harmless based upon the State's common law proof of impairment for the reasons set forth in Point I, supra.

III. THERE IS NO REVERSIBLE ERROR IN THE JURY

INSTRUCTIONS PROVIDED BY THE CIRCUIT COURT PERTAINING TO THE READ BACK OF TESTIMONY.

Defendant further contends that the Circuit Court erred when it instructed the jury about read back of testimony. The State submits that this issue is without merit.

The facts relevant to this issue are as follows. At the beginning of jury selection, the Circuit Court instructed the jury that:

"Now, I want to remind you that although [the reporter] makes a record of these proceedings, she does not prepare a transcript of the testimony as it is happening during the trial. So if you have a question about the testimony of a particular witness during your deliberation, you can't we can't just give you a transcript of that testimony. If it is absolutely necessary to help you reach a verdict, then we can read to you the notes that she has of that testimony but that is a difficult and time consuming process which is why we ask you to pay close attention to the testimony as it's coming in." (T8-9).

No objection was registered when the instruction was given. Later, at the jury charge conference, Defendant requested that the court instruct the jury that it is within their province to request that testimony be read back. (T766). No direct comment

followed from the Circuit Court, but Defendant's counsel did argue on summation that the jury could "have an opportunity to request any and all testimony [be] read back." (T803). The record also reveals that the Circuit Court instructed the jury, in part, immediately before deliberation began, as follows on December 2, 1999:

"Let me remind those of you who took notes those notes are for your own use. Although you can use them, you can't show them or try and influence the other jurors. And if you did not take notes, I want to remind you that your recollection is just as valuable as a juror who did take notes. And again, as I told you earlier, if you need testimony reread, we can do that. Although it is a difficult and time consuming process. But I didn't want you to think from what I said earlier it cannot be done. If you want us to do that, we will. But I will ask you to start your deliberations at this time" (R124).

The standard of review on appeal as to whether to give or withhold a jury instruction is that of abuse of discretion. James v. State, 695 So.2d 1229,1236 (Fla. 1997). No such abuse can be demonstrated here.

Defendant cites to a host of authority underlying Fla. R. Crim. P. 3.410. That Rule does not really apply here. The jury never asked for a read back. Rather, after the Circuit Court

initially instructed the jury, without objection, about read back, while being permitted, was time consuming, defense counsel obviously thought about it and requested an instruction from the Circuit Court to clarify the point just to make sure that the jury would know that they could have testimony read back. Defendant closed by pointing out that the jury could have testimony read back. The instruction above, clearly provided from the record immediately before the jury retired to deliberate, sets forth that the jury could have testimony read back if requested. The Circuit Court also made it clear that he did not want the jury to think that from what he had instructed earlier, that it could not be done. As such, nothing was set forth to indicate that the jury would not be permitted to have read backs. Rather, exactly the opposite is clear. The jury was properly instructed that they could have a read back if they desired it. Accordingly, there is no error on this point.

CONCLUSION

WHEREFORE, based upon the foregoing argument and citations of authority, the State respectfully requests that this Court decline to exercise jurisdiction and conclude that review was improvidently granted, or alternatively, that the judgment and

sentence of the Third District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was mailed to DOROTHY F. EASLEY, PO Box 144389, Coral Gables, Florida 33134, on this ___ day of February, 2002.

_____

FRANK J. INGRASSIA
Assistant Attorney General

CERTIFICATE OF TYPE SIZE

I HEREBY CERTIFY that 12 point Courier New type size was utilized to prepare this Brief and is in compliance with Fla. R. App. P. 9.210.

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FRANK J. INGRASSIA