IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1355
District Court of Appeal,
Third District Case No. 3D00-591

RAUL MORALES
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

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

PETITIONER'S *CORRECTED* INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS[1]

A. Introduction

This petition concerns Raul Morales' conviction for boating under the influence/manslaughter, § 327.351(2), Fla. Stat. (1998) (Count I).[2] R. 3-4, 93-94. Mr. Morales was sentenced on Count I to 207 months. R. 109-11, 118-20.

B. Pre-Trial Motions and Rulings Pertinent to this Petition

1. Pertinent Orders on Motions in Limine

The State moved in limine to "deny any motion to suppress evidence in this case which is not filed prior to trial (e.g., motions to suppress breath and/or blood test results, statements made by the defendant, etc.)", citing *C.E. v. State*, 555 So. 2d 898 (Fla. 3d DCA 1990), and *Wingert v. State*, 353 So. 2d 643 (Fla. 3d DCA 1977). R. 45-53, 55, 209. The defense stated it was not filing a motion to suppress. T. 220-21.

The court granted the State's motion in limine to exclude, as the defense requested, "the defendant's breath alcohol test results", "the fact that a breath alcohol

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[1] R. __ refers to the record on appeal. T. __ refers to the trial and sentencing hearing transcript. I.B. refers to the Initial Brief, A.B. refers to the Answer Brief and R.B. refers to the Reply Brief filed with the Third District Court of Appeal, respectively. "Mtn. for Corr." refers to Mr. Morale's Motion for Correction or Rehearing filed with the Third District Court of Appeal. The parties will be referred to as they were below.

The State does not dispute Mr. Morales' statement of the case and facts set forth in his Initial Brief filed with the Third District Court of Appeal and virtually identical herein, or in Mr. Morales' Petition for Discretionary Review filed with this Court. *See* I.B. and A.B., filed with the Third District Court of Appeal.

[2] The Third District Court of Appeal vacated Mr. Morales' conviction for vessel homicide, § 782.072(2), Fla. Stat. (1998) (Count II) .

test was administered" and that "Officer Kaloostian did not charge the defendant with Failure to Render Aid under Florida Statute 327.30(5)." R. 50, 55, T. 3-4, 209, 221-25. The court granted in part and denied in part the State's motion in limine to exclude Defendant's statements denying culpability, allowing his statements to Coast Guard Officers Ludwig and Lamenza. T. 209-18. The defense agreed to the introduction of Mr. Morales' statement, as translated and in Spanish. T. 225-26.

C. The Trial

1. Opening Statement

The State opened that, on September 27, 1998, the victim, Hubert Jaurequi, was on a jet ski in a manatee zone along McAurthur Causeway when Mr. Morales, on his third pass along that channel, plowed into Mr. Jaurequi with his boat designed like a race car with so much force that it lacerated Mr. Jaurequi's back, literally into his vital organs. T. 237-40. The evidence would show that Mr. Morales did not turn around until jet skiers retrieved him and forced him to return. T. 240-41. The evidence would also show that the Coast Guard had reasonable cause to believe Mr. Morales was under the influence of alcohol, and they conducted field sobriety tests and later, upon flunking some of those tests, subjected Mr. Morales to a blood draw at a nearby hospital. R. 240-44. After Mirandizing Mr. Morales, Mr. Morales would freely give his story of what happened, admit he hit the victim, and blood tests would later reveal a .07 blood alcohol reading, the equivalent of three beers. T. 243-45.

The defense theory was this was "the prosecution's attempt to criminalize what

is clearly an accident in this matter." T. 246-47. There would be no evidence that Mr. Morales intentionally acted "to hurt or kill anybody that day." T. 246-47. The alcohol reading was below the legal limit. T. 247. And the Defendants' statement that he consumed three beers just before the accident would be consistent with the physical evidence here that he was not impaired at the time of the accident, as he passed almost all sobriety tests clean, free "a hundred percent". T. 247-49, 251-54. Mr. Morales did not dispute that he drove his boat and struck and killed the victim, and the evidence would show he returned upon learning he hit someone. T. 250-53.

2. The Testimony

Ivana Posada testified she arrived at the beach near MacAurther Causeway on September, 1998, around 1:00 p.m. when she noticed two men in a boat on September, 1998, with a large engine, speeding west to east and then turning south into the manatee zone toward two jet skiers roughly ten feet apart. T. 255-61, 266-67. Ms. Posada recalled the sign by the shore was a no wake, manatee zone. T. 264-65.

On the first pass, Mr. Morales' boat did not come close to the jet skiers. T. 274. On the second pass, the boat came toward the jet skiers, stationary and "idle sitting in the water." T. 261, 275-76, 285. None of the jet skiers tried to cut Mr. Morales' boat off or cross its path. T. 284-85. She "imagined [the boat] was going to make it between the two [jet skiers], but. . .they didn't have much distance between them. And the boat went through it and struck the jet ski most to the south", closer to the beach. T. 261-62. Ms. Posada observed the boat's hull hit the jet skier with a

life jacket on the side, the jet skier was thrown off the jet ski, he floated in a pool of blood and a nearby man jumped into the water to get him. T. 262-63, 267, 277.

Ms. Posada did not "think the[boater, Mr. Morales,] realized it had been such damage". T. 263-64. So Mr. Morales continued west and then stopped in front of some buildings when jet skiers reached his boat. T. 263-64. When Mr. Morales returned, "it appeared to [Ms. Posada] that [he] didn't realize what happened". T. 279, 285. Ms. Posada, some twenty feet away, made "the observation that [Mr. Morales] look[ed] distorted as if he was in shock about what happened and hadn't realized the extent of what happened". T. 281-82.

There were no police or marine patrol authorities when Mr. Morales returned to the scene. T. 280-81. The victim was brought to shore, had a gash in his back, eyes open, and then went unconscious and no longer moved. T. 267-68. Ms. Posada had to call "911" twice, a first time to help the victim and a second time because the individuals with the victim were raging after Mr. Morales. T. 268-69, 279. When the Coast Guard arrived later, Mr. Morales got on their boat. T. 281.

Leudelis Alvarez's testimony was similar to Ms. Posada's. T. 255-82. The victim, Hubert Jaurequi, was her husband's best friend. T. 285-87. They had all gone with friends to the marina off MacAurther Causeway to ride jet skis, arriving around 1:30 p.m. T. 285-87. Along the beach, there was a "slow, manatee zone", where people swam and jet skiers were to pass slowly. T. 289-91. Mr. Morales' fast speed was normal because he was farther away. T. 294. Ms. Alvarez estimated Mr. Morales

to be traveling 50 mph down the manatee zone. T. 294-97, 306. She admitted having no training in estimating watercraft speeds, and no real way to differentiate between 30 mph and 50 mph in the water. T. 307-08.

Ms. Alvarez admitted giving a written statement to the Coast Guard in which she told the investigator that, when the driver of the boat passed the manatee sign, he did not appear to see the victim. T. 313. She did not see the boat slow down or swerve to avoid hitting the victim and she did not see the victim swerve in front of the boat. T. 298-99. She observed the boat leave the manatee zone for the deeper part of the channel and then two jet skis go after the boat to return it to the scene. T. 299-300, 318. The boat returned voluntarily. T. 315.

Ms. Alvarez went to the front of the marina to guide emergency rescue, she saw the boat on the shore when she returned, and she observed Mr. Morales standing there numb, putting salt water in his mouth. T. 300-02, 316. Mr. Morales was swaying and he had difficulty ascending the stairs when the Coast Guard arrived. T. 302-03. The victim's friends attacked Mr. Morales, but she did not personally see it. T. 303-04, 316.

Similar to Ms. Alvarez, T. 285-316, Osmel Fernandez, Ms. Alvarez's husband, testified that the victim, whom he had known for eighteen years, was like a brother to him. T. 319-20. Mr. Fernandez admitted testifying in his deposition that they arrived around 12:00 noon and the accident happened just one-half hour later. T. 347. He was surprised to know that the accident happened after 4 p.m. that day. T. 347.

Mr. Fernandez further testified seeing a racing boat traveling approximately 50 mph inside the manatee zone, strike the victim, who was wearing a safety vest, the victim fell back into the water, the seat flew into the air, and Mr. Fernandez jumped into the water to help the victim, now hurt very badly. T. 320-21, 335-37. He admitted having no training in estimating car or boat speeds. T. 341. He admitted using the jet skis in those areas before to jump wakes. T. 344. Like Ms. Alvarez, he also testified without objection that it appeared Mr. Morales "didn't see him or something." T. 323-25. The boat returned to the beach some ten minutes later. T. 328. Mr. Morales "asked what happened", as he had no idea how badly the victim was hurt, and his voice "wasn't clear", as if he was tired. T. 333-34, 351-52. Mr. Fernandez described Mr. Morales' eyes as red and shiny and his smell of alcohol. T. 329-31.

Mr. Fernandez was "really angry" and approached Mr. Morales with one thing on his mind – he was "going to hit him" and make him pay for what he did to his friend. T. 330, 332, 349. He punched Mr. Morales "in his face"; then testified he did not hit him in the face, but in his neck and back. T. 330, 332, 351. He also hit Mr. Morales in the ribs. T. 351. Mr. Morales could not stand and was falling. T. 331. Mr. Fernandez did not know if Mr. Morales' difficulty in standing was the result of his hitting him in the ribs, and might be a "possibility". T. 351. Mr. Fernandez was not going to let Mr. Morales near the victim. T. 352. Three other men with Mr. Fernandez attacked Mr. Morales as well, preventing anyone from helping the victim now lying on the beach. T. 352.

Leonardo Guzman's testimony was similar to Ms. Posada's, Ms. Alvarez's and Mr. Fernandez's. T. 631-40, 647. Mr. Guzman testified "it seemed like [the driver of the boat, Mr. Morales] didn't know" and kept going. T. 646, 651. He estimated the boat was traveling between 40 and 50 mph. T. 647. The jet ski attempted to move out of the way, the boat caught the victim, there was a loud bang, and then the victim, wearing a life vest, fell into the water. T. 642-43. He saw no one veer into the boat or cut it off. T. 642-43. Mr. Guzman could not focus on Mr. Morales' faculties to determine whether he was impaired because, almost from the time Mr. Morales arrived, he was pulled out of the boat and beaten. T. 655-56. Almost immediately from the time Mr. Morales returned in his boat, Mr. Guzman saw at least two men pull him from the boat and start to beat him. T. 653-54.

U.S. Coast Guard Officer Rodimus Lamenza testified that on September 27, 1998, he and U.S. Coast Guard Officer Ludwig arrived at the scene, in response to an emergency call of a boat accident. T. 361-63. Another, smaller Coast Guard boat was already at the scene. T. 364. Raul Morales was one of the two individuals who boarded the Officers' boat. T. 365. Some fifteen minutes later, they arrived at the station dock. T. 367. Mr. Morales had trouble stepping from the boat onto the pier. T. 367-68. Officer Lamenza did not smell alcohol on Mr. Morales. T. 382-83. He was roughly one foot from Mr. Morales. T. 382-83.

Once inside the Coast Guard station, Officer Lamenza served as translator for Officer Ludwig and then for Florida Marine Patrol Officer Curt Kaloostian's interview

hours later. T. 368-76. Mr. Morales was able to talk to Officer Lamenza in a direct manner, he was cooperative, he answered the questions presented to him and he was very serious. T. 391-93. Officer Lamenza translated the field sobriety test explanations into Spanish. T. 369-70, 390-91. At the time the field sobriety tests were being administered, Officer Lamenza did not know the right versus wrong way to conduct them. T. 383. He admitted testifying in his deposition that he had no opinion that day on whether or not Mr. Morales passed or failed his tests, he had no training at that time, and Officer Lamenza was not concentrating on how Mr. Morales was performing his tests, but on Officer Lamenza's translations to Mr. Morales. T. 385-88. Officer Lamenza took no notes to refer to later regarding Mr. Morales' performance on the sobriety tests. T. 389, 399-400, 403.

After reading Mr. Morales his Miranda rights at 9:58 p.m., Officer Kaloostian interviewed Mr. Morales and then Mr. Morales wrote out his own statement, which Officer Lamenza translated and witnessed. T. 373-76, 398. Officer Ludwig confirmed that Mr. Morales only had a sixth grade education. T. 441-42. Officer Lamenza noticed Mr. Morales' very poor grammar and the handwriting made his statement very difficult to understand, not in the manner of an educated man, so the Officer reviewed it with Mr. Morales word for word. T. 377-78, 394-97.

Officer Ludwig testified that on September 27, 1998, he recieved a call at 4:14 p.m. of a boating fatality just north of MacAurther Causeway, arriving at the scene around 4:25 p.m. T. 404-08, 432. He observed a mob, another smaller Coast Guard

boat and emergency medical technicians already at the scene. T. 408-09, 432. Officer Ludwig described the sixteen-foot boat, white with a 200 horsepower outboard engine, T. 409-11, 414, overpowered by federal regulation standards. T. 415, 416.

Officer Ludwig testified Mr. Morales, when he was brought to him around 4:33 p.m., had the smell of alcohol and a sleepy attitude when he got into the boat. T. 412-13, 433, 444. He asked Mr. Morales, while on board the vessel, to tell him what happened, and Mr. Morales complied. T. 435. Officer Ludwig checked on his DUI test report that Mr. Morales' face was flushed and his eyes were bloodshot, but agreed the photograph reflected someone who had been out in the sun all day and that he could not say his bloodshot eyes were not a product of being on salt water all day. T. 437-38, 445-46, 479.

After boarding and inspecting the boat, Officer Ludwig took Mr. Morales and his passenger to the Coast Guard station to conduct field sobriety tests. T. 416-17. They arrived at the station around 5 p.m. T. 417. Mr. Morales' English was very slight, so Officer Lamenza translated the field sobriety tests. T. 418. Officer Ludwig performed a series of field sobriety tests, not specifically recalling Mr. Morales' performance on them. T. 419-27. After referring to his test report, he recalled Mr. Morales did not complete these tasks without error. T. 419-27. He did not know how many errors Mr. Morales made on his DUI tests; he took no notes on what Mr. Morales specifically could not do. T. 455-69.

Mr. Morales did not lose his balance or use his arms for balance or stumble or

fall. T. 465-71. He cooperated in every way, did not cause any problems, was not insulting, and never fell asleep on the boat or at the station. T. 434-35, 447-49. He was able to follow all directions, but required translations. T. 449, 452-54. Officer Ludwig admitted that the fact that Mr. Morales could communicate intelligently in English, not his primary language, and that Officer Ludwig was able to largely understand Mr. Morales' details of the accident, were factors that Mr. Morales was in control of his normal faculties. T. 472-74. Officer Ludwig marked on the test report that Mr. Morales' speech was confused, not slurred or mumbled, because he did not understand everything Mr. Morales was telling him and agreed that could have been Mr. Morales' inability to speak much English and Officer Ludwig's inability to speak any Spanish. T. 474-76. Officer Ludwig also agreed this did not necessarily indicate Mr. Morales was impaired. T. 476.

Officer Ludwig testified Mr. Morales told him he was driving his vessel, traveling east, and saw a boat full of girls next to him, prompting him to move closer toward land when suddenly a jet ski was in front of him and he struck the jet ski. T. 481. When he returned to the beach to the victim, a group jumped him and started to beat him. T. 481. The events of the day could have contributed to Mr. Morales' mistakes, not that Mr. Morales was under the influence. T. 477. Officer Ludwig saw a cut above Mr. Morales' eye and a cut on his lip. T. 481.

Based on Mr. Morales' conduct on these tests, his eyes, and his alcohol odor, Officer Ludwig thought Mr. Morales was under the influence and impaired by alcohol.

T. 427, 431, 471, 483-84. So he turned Mr. Morales over to Florida Marine Patrol Officer Curt Kaloostian. T. 429.

Officer Kaloostian testified he was lead investigator of the boating fatality on September 27, 1998 at approximately 4:15 p.m. T. 531-33. When Officer Kaloostian arrived at the scene at roughly 4:34 p.m., the victim had already been transported to the hospital by fire rescue and Mr. Morales had already been taken aboard the Coast Guard vessel. T. 536. Before going to the Coast Guard station, Officer Kaloostian photographed the scene, noted damage on the vessels and located and interviewed witnesses, there for roughly one hour. T. 537-38.

Officer Kaloostian identified three witnesses – Leudelis Alvarez, Iovana Posada and Alfonso Paros. All of these individuals gave statements. T. 581-82. He inspected the boat and the jet ski and took some fibers from the boat to match it to some of the items on the jet ski. T. 585. The information Mr. Morales gave him did not contradict the physical evidence. T. 591. He later testified the physical evidence did not corroborate Mr. Morales' version of the story or any story. T. 626. The physical damage told Officer Kaloostian where the boat and the jet ski were in relation to each other, but did not tell how the collision occurred. T. 590-91.

Officer Kaloostian arrived at the Coast Guard station at 5:36 p.m., and met Mr. Morales there at 6:22 p.m., at which time he saw no signs of injury, but smelled the odor of alcohol on him; field sobriety tests had already been performed. T. 538-39, 591-92. Officer Kaloostian decided to take Mr. Morales to the South Shore Hospital

for a blood draw, performed by Alexander Roman, an emergency medical technician of the Hospital. T. 540-41.

Officer Kaloostian generally described the blood draw kits: they come sealed with red tape, and contain blood preservative. T. 543-44. He observed the blood draw of Mr. Morales and saw the collected blood go into a blood draw kit's glass tubes, at 6:50 p.m. T. 545-47.

South Shore Hospital emergency room nurse, Alexander Roman, testified that on September 27, 1998, he drew the blood of someone whom Officer Kaloostian brought in to the emergency room. T. 484-87, 488. He could not be certain Mr. Morales was that person. T. 487. Officer Kaloostian brought his own blood draw kit. T. 488-89. Mr. Roman identified his handwriting on the vials of the blood he collected for Officer Kaloostian that day. T. 489-91. He testified the person brought in by Officer Kaloostian smelled of alcohol. T. 490-91.

Richard McClure, toxicologist with Miami-Dade County, testified he used a gas chromatograph and analyzed the blood in two vials, in a blood collection kit, with assigned case number 98-0487, submitted by Florida Marine Patrol Officer Curt Kaloostian. T. 506-11. The defense objected and sought to exclude the blood sample, citing Florida Administrative Code Section 11D 8.012, because there was no testimony by the sample collector that the blood was placed in a tube actually containing anti-coagulant substance, which the court overruled. T. 512-13.

Mr. McClure testified that these gray stopper vials used for these blood kits

contain anticoagulants that keep the blood from clotting or clumping together, and this blood was in a liquid state. T. 513-15. He further testified that, if the blood did not contain anticoagulants, it would not be in a liquid state. T. 514. The court granted the defense request for voir dire, and the defense confirmed that Mr. McClure performed no test to confirm the substance he analyzed was blood. T. 515. The defense further confirmed that Mr. McClure thought it was blood because it had the same consistency. T. 515. Mr. McClure was not at the collection point of the evidence and admitted that, other than the fact that the samples are not clotted, he had no idea whether these tubes contained anticoagulants. T. 516.

Mr. McClure reported the blood alcohol test readings on October 9, 1998 to be: .0749, .0723, .0753 and .0726, with a final report of a blood alcohol level of .07. T. 519-20, 522. None of the samples had .08 or higher alcohol levels. T. 523-24. December 3, 1998 tests also performed on these samples showed no presence of controlled substances. T. 520-22.

After the blood draw, Officer Kaloostian returned to the Coast Guard station, spoke to the passenger on Mr. Morales' boat, as Officer Lamenza translated, for roughly one hour, and then asked Mr. Morales if he would be willing to make a statement. T. 547-49. At 9:58 p.m., Officer Lamenza translated the Miranda Rights Waiver Form for Mr. Morales, Mr. Morales voluntarily signed that Form and their interview began. T. 549-51, 592-94. Mr. Morales stated to Officer Kaloostian that he had gotten to the Venetian Causeway bridge, he turned east towards Japanese

Gardens, part of Watson Island, traveling in his boat at roughly 45 to 50 mph during the first two passes and 48 to 49 mph on the third pass, he saw two jet skiers on his right side, two on his left, and one of the two on his left, the male operator, cut in front of the female operator on the jet ski and in front of the boat, which Mr. Morales' boat struck. T. 552-54. Mr. Morales estimated the speed of the jetskier cutting in front of him to be 36 mph while Mr. Morales' boat was traveling roughly 48 mph. T. 553-54. He acknowledged he made a mistake traveling in the manatee zone at that speed, he knew the sign was there, and he had a six-pack of beer on the boat, three of which he had just consumed. T. 554. At 10:17 p.m., Officer Kaloostian gave Mr. Morales an opportunity to make a written statement in his own words, which was subsequently translated into English. T. 554-55, 595-97. The question of how long Mr. Morales saw the jet ski before he hit it was not addressed. T. 597-98. Mr. Morales' written statement was read to the jury without objection. T. 556-57. The State and the defense stipulated the document was an accurate translation. T. 557-58.

Officer Kaloostian attended the autopsy of the victim the following day, performed by Dr. Ray Fernandez, Miami-Dade County Medical Examiner Office, where he observed on the victim a severely lacerated lower right back, horizontal in direction, evidence of major trauma, trauma to his arm, upper arm and behind the ear, indicative of damage resulting from downward compression. T. 558-62.

Dr. Ray Fernandez of the Miami Medical Examiner's Office testified the victim died at Jackson Memorial Hospital, was delivered to her for examination, and her

examination revealed the right upper arm had a closed fracture with some abrasions (one "pattern injury"), and removed skin overlaying that bone, the right side of the back had a large, open laceration ("a second pattern injury) where the skin had been torn apart and the 11th and 12th ribs had been fractured. T. 717-30. Dr. Fernandez determined the two pattern injuries upon measuring Mr. Morales' boat and comparing the injuries with the victim's life vest. T. 730-32. Underneath the large laceration to the victim's right back, the victim's right kidney and his liver sustained injuries. T. 733. These were forceful injuries caused by the impact of the right front of the boat, the bow, but Dr. Fernandez could not determine the amount of force. T. 733-36. The cause of death was multiple blunt force injuries. T. 736-38.

Officer Kaloostian's inspection of the victim's jet ski reflected that the jet ski's right side was the primary point of the impact. T. 564-66. His investigation reflected that, at the time the collision occurred, the victim's jet ski was making a clockwise turn. T. 614. He concluded this based on witness interviews. T. 615-16. Mr. Morales told Officer Kaloostian that the jet ski turned in front of him. T. 616.

Based on the damage, Officer Kaloostian could not arrive at an estimated speed at which the boat might have been traveling. T. 618-19. Physical evidence alone could not show whether the jet ski was moving or idle at the time of the collision. T. 617-18. There was no structural damage to Mr. Morales' boat, and the only indication of the point of impact on the boat was the presence of purple fibers embedded in the screws in the boat's bow. T. 623. It appeared that Mr. Morales' boat T-boned the victim's

jet ski, and could have been riding on a plane. T. 623-24.

Officer Kaloostian testified jet skis were allowed in the manatee, slow speed, minimum wake zone. T. 537. Boats were allowed to travel back and forth in the waterway around Watson Island. T. 580. He further testified that jet skis, on the average, could reach a top speed of 45 mph. T. 566. The manatee zone was regulated for the safety of manatees. T. 612.

Officer Kaloostian tested Mr. Morales' boat and detected the boat did not go in reverse, the engine would not trim up and down, and the steering had a kink that made it "a little tougher to turn". T. 600-06, 620-21, 630-31. Mr. Morales' boat rpm gauge did not work, and the speedometer was not calibrated. T. 600-06, 620-21, 630-31. During Officer Kaloostian's speed test, the speedometer on Mr. Morales' boat indicated the boat was traveling 51 mph when radar clocked it at 41 mph and then 38 mph. T. 600-06, 620-21, 630-31. The vibration became so great that it was uncomfortable to ride at that speed. T. 610. The speedometer needle bounced considerably, making its accurate reading difficult. T. 606-09.

Officer Kaloostian confirmed Mr. Morales' boat was roughly sixteen feet, with a design to enable the boat to go faster than a traditional design, outfitted with an accelerator like a car, a throttle for shifting gears, a speedometer, and an unusual seating arrangement where the passenger sits behind the operator. T. 570-73. The accelerator "Hot Foot" in the boat was no indicator of how fast Mr. Morales was traveling at the time of the collision. T. 602.

During his inspection, Officer Kaloostian detected and removed two Phillips head screws in the right front corner of the boat that contained purple-colored fiber embedded in their slots, which he submitted to the Miami-Dade Crime Lab for analysis. T. 574-77. George Borghi, of the Miami-Dade Police Department Crime Laboratory, testified he traced identical fibers from a purple life vest to two Phillips head screws that Officer Kaloostian gave him. T. 494-505. The defense renewed, and the court overruled, its objection to admission of the test results. T. 517.

Forensic toxicologist, Chip Walls, testified even one drink can impair a person, without the person being intoxicated, first affecting the thinking parts of the brain, then motor coordination and possibly leading to death due to respiratory depression. T. 660-67. He testified it was possible for a person to be impaired by alcohol with a blood alcohol level of less than .08 percent. T. 667. But someone who drinks regularly develops a tolerance to some of the effect of alcohol. T. 686, 713-14. The field sobriety tests were useful tools in determining whether someone was impaired by alcohol, with the greater the impairment related to the poorer performance on those tests. T. 671-72, 715.

A language barrier could also affect the results of the tests. T. 695-96. Mr. Walls also testified the person being tested could have normal faculties but not understand the question. T. 697. And the officer conducting the test could not be sufficiently trained or properly conducting the sobriety tests to yield reliable results. T. 699-700.

Mr. Walls testified that, without more information, he could not state with scientific certainty Mr. Morales' blood alcohol level at the time of the collision. T. 701. The time of the last drink and the type of food consumption were the most important information affecting alcohol concentration peak or height. T. 702-03.

> Well, the number of drinking scenarios could be quite complex. As I have said earlier, in my opinion there's three possibilities that it could have been. It could have been lower at the time of the accident, it could have been essentially equal to the blood alcohol level found, or it could have been higher than we found at 6:50 [p.m.]. T. 704-06, 710.

Mr. Walls further agreed that a lower blood alcohol level at the time of the collision that was rising could also mean *a lower impairment* that was also rising then:

> Q. *And because it's possible under the scenarios that the prosecutor and [the defense] have given you that the blood alcohol level would be below an 07 at the time of the accident, the person's impairment at the time of the accident would also be less*, true?
>
> A. *Generally that's true*. Again, as I mentioned earlier, if the blood alcohol level is rising rapidly then the rate of the rise could be more of a predictor of impairment then just the number itself.
>
> Q. And I guess really the last question that I am going to ask you is *because of the lack of information that we have here, the three scenarios that you have explained to this jury are at this point in time three equally possible scenarios*, correct?
>
> A. *Yes*. The more information you have, the more specific you can be. T. 710-11 (emphasis added).

Mr. Walls also testified it was possible for someone with a blood alcohol level of .07 to have had a lower blood alcohol content at the time of the collision. T. 679-84.

3. Motions for Judgment of Acquittal

Pertinent, at the close of the State's case, the State rested and the defense first renewed all its prior objections and all motions. T. 741-42. The defense moved for judgment of acquittal on Counts I and II. T. 740-42. As to Count I – boating under the influence/manslaughter – the defense argued that the charge of being under the influence of a controlled substance was not established and the requisite blood alcohol, as in the charging document, was not established. T. 741-43. Mr. Morales was also not operating the vessel in a reckless manner because the manatee low speed zone was not for the protection of people, but for manatees, and speeds of 38 to 41 mph are not excessive speeds. T. 744-45.

The court granted judgment of acquittal on Count I as to Mr. Morales being charged with "under the influence of a chemical substance" and the breath test, but denied judgment of acquittal on the "impairment" or the ".08 or above" blood alcohol portion of Count I. T. 746-47. Mr. Morales did not testify, the defense rested and it renewed its same judgment of acquittal motions. T. 747-48.

4. Charge Conference and Jury Instruction Arguments

During the charge conference, the defense objected to an instruction on the presumption of impairment because of inadequate predicate for the introduction of the blood alcohol level tests and because there was no testimony that Mr. Morales' blood alcohol content was at .08 to warrant such an instruction. T. 756-57. The court overruled the objection to the instruction, based on all the testimony presented on impairment, but deleted reference to breath. T. 757-78, 764.

5. Jury Instructions, Verdict and New Trial Motion

After closing arguments, including State argument on BAL of .08 and the statutory presumptions of impairment, T. 779, 783-84, 797-98, the court charged the jury the next morning, including the statutory presumptions of impairment, over defense objection. T. 756-58. Mr. Morales was convicted of boating under the influence ("BUI")/manslaughter (Count I) and vessel homicide (Count II). T. 860-62.

Also pertinent here, the defense moved for new trial, in part because: (1) the verdict on the BUI homicide was contrary to law based on Chip Walls testimony, R. 96-97, (2) the blood alcohol level readings should not have been admitted into evidence where the criteria of Rule 11D-8.012, Fla. Admin. Code, were not satisfied, and (3) the jury should not have been instructed on the statutory presumptions of impairment based on the blood alcohol levels that failed to satisfy Rule 11D-8.012 or scientific predicate. R. 96-115, I.B. at 24-26, Mtn. for Corr. at 3-5. The court denied the motion after the State filed opposition to the new trial motion and Mr. Morales timely appealed his convictions under Count I, boating under the influence/manslaughter, and under vessel homicide, Count II. R. 112-17, 128.

On April 25, 2001, the Third District affirmed the BUI manslaughter conviction and sentence, and vacated the vessel homicide conviction, rendered final on May 30, 2001 upon denial of Mr. Morales' Motion for Correction or Rehearing ("Mtn. for Corr."). On June 13, 2001, Petitioner timely filed his notice to invoke discretionary jurisdiction based on conflict, and on June 23, 2001 successfully petitioned this

Honorable Court for discretionary review of the Third District Court of Appeal decision, pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. All remaining pertinent facts are included in the respective Arguments sections.

STANDARDS OF REVIEW

De novo review governs the legal issues of constitutionality and statutory construction.[3] Incomplete and misleading jury instructions are fundamental error,[4] but selection of the language formulating those jury instructions is governed by an abuse of discretion standard of review.[5] Evidentiary rulings[6] and decisions over whether to allow a jury to rehear trial testimony[7] are both subject to an abuse of discretion standard of review.

SUMMARY OF THE ARGUMENTS

For the reasons and legal authority set forth herein, it is respectfully submitted that the conviction and judgment entered thereon for Boating Under the Influence/Homicide must be reversed and remanded for a new trial. First, it was error to instruct the jury on the statutory presumptions of intoxication. Second, the blood-

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[3] *City of Jacksonville v. Cook*, 765 So. 2d 289 (Fla. 1st DCA 2000); *Dept. of Ins. v. Keys Title*, 741 So. 2d 599 (Fla. 1st DCA 1999).

[4] *Hubbard v. State*, 751 So. 2d 771 (Fla. 5th DCA 2000).

[5] *Bozeman v. State*, 714 So. 2d 570 (Fla. 1st DCA 1998); *Thomas v. State*, 617 So. 2d 1128 (Fla. 3d DCA 1993).

[6] *Sexton v. State*, 697 So. 2d 833 (Fla. 1997).

[7] *Henry v. State*, 574 So. 2d 66 (Fla. 1991), *cert. den'd*, 516 U.S. 830 (1995).

level alcohol evidence was not admissible because it failed to satisfy the statutory or common law requirements in that there was no testimony that anti-coagulants to stabilize blood alcohol testing were present in vials in which Mr. Morales' blood was collected. And that goes to the heart of sample stability and reliability. It was also reversible error to instruct the jury that rereading the testimony would be extremely difficult. Even if the Court concludes that these errors in isolation are insufficient to reverse and remand for a new trial on Boating Under the Influence/Homicide, they are cumulatively sufficient to rise to the level of great prejudice and warrant reversal.

ARGUMENTS

I. It Was Error to Instruct the Jury on the Statutory Presumption of Impairment Based on the Blood Alcohol Test Results Under Rule 11D-8.012.

"The implied consent law consists of sections 316.1932, 316.1933, and 316.1934, Florida Statutes, which essentially require all persons accepting a license to drive in Florida to consent to a blood-alcohol test upon being arrested for driving under the influence."[8] The legislature delegated to the Florida Department of Law Enforcement ("FDLE") the task of formulating and approving the process by which a person's blood is analyzed.[9] Compliance with the FDLE's administrative rules is

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[8] *See Robertson v. State*, 604 So. 2d 783, 789, n.4 (Fla. 1992).

[9] The rules implementing the implied consent law formerly were promulgated by the Department of Health and Rehabilitative Services. Effective July 1, 1992, the Legislature transferred the implied consent program to the FDLE. *See* Ch. 92-58, § 20, Laws of Fla. The rules promulgated by the FDLE became

essential because the presumption of impairment turns on process integrity.[10]

The version of Florida Administrative Code Rule 11D-8.012 (emphasis added), in effect in this case,[11] required that the preservative and anti-coagulant powder be in

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effective October 31, 1993. *See also* § 316.1933(2)(b), Fla. Stat. (1998).

[10] *See State v. Bender*, 382 So. 2d 697, 699-700 (Fla. 1980), *limited by, Robertson v. State*, 604 So. 2d 783 (Fla. 1992).

[11] The newly amended version of 11D-8.012 provides for more specific procedures for collection, preservation and processing of blood samples:

> (1) Before collecting a sample of blood, the skin puncture area must be cleansed with an antiseptic that does not contain alcohol.
>
> (2) *Blood samples must be collected in a glass evacuation tube that contains a preservative such as sodium fluoride and an anticoagulant such as potassium oxalate or EDTA (ethylenediaminetetraacetic acid). Compliance with this section can be established by the stopper or label on the collection tube, documentation from the manufacturer or distributor, or other evidence*.
>
> (3) Immediately after collection, the tube must be inverted several times to mix the blood with the preservative and anticoagulant.
>
> (4) Blood collection tubes must be labeled with the following information: name of person tested, date and time sample was collected, and initials of the person who collected the sample.
>
> (5) Blood samples need not be refrigerated if submitted for analysis within seven (7) days of collection, or during transportation, examination or analysis. Blood samples must be otherwise refrigerated, except that refrigeration is not required subsequent to the initial analysis.
>
> (6) Blood samples must be hand-delivered or mailed for initial analysis within thirty days of collection, and must be initially analyzed within sixty days of receipt by the facility conducting the analysis. Blood samples which are not hand-delivered must be sent by priority mail, overnight delivery service, or other equivalent delivery service.
>
> (7) Notwithstanding any requirements in Chapter 11D-8, F.A.C., any blood analysis results obtained, if proved to be reliable, shall be acceptable as a valid blood alcohol level.

the vial at the time of collection:

> 11D-8.012 Blood Samples - Labeling and Collection.
> (1) All blood sample vials or tubes shall be labeled with the following information:
> (a) Name of person tested;
> (b) Date and time sample collected;
> (c) Initials of personnel collecting the sample.
> (2) Cleansing of the person's skin in collecting of the blood sample shall be performed with a non-alcoholic antiseptic solution.
> (3) Blood samples *shall be collected in a vial or tube containing an anticoagulant substance*. Said vial or tube shall be stoppered or capped to prevent loss by evaporation.

But it said little more about preservatives or anti-coagulants, their nature, or how their presence might be confirmed. While there were "substantial compliance" clauses under the Rule and a separate "savings" clause in the case of section 316.1934(3), which applied to the "methods approved by [HRS]", the core policies of the implied consent law remained to ensure *scientific reliability* of the tests, and to protect the health of test subjects.[12]

The due process adequacy of the FDLE's rules and procedures was considered in *State v. Miles*, 732 So. 2d 350 (Fla. 1st DCA 1999)(*Miles I*), *approved in part and quashed in part*, 775 So. 2d 950 (Fla. 2000) (*Miles II*). In *Miles I*, the First District held that the FDLE rules were inadequate because they failed to ensure reliable testing

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Rule 11D-8.012, Fla. Admin. Code Ann. (amended July 29, 2001).

[12] *See Robertson*, 604 So. 2d at 789, n.5.

and analysis of blood samples.[13] In *Miles II*, this Court agreed, and held further, that the State would not be entitled to a jury instruction on the statutory presumption of impairment, even if the evidence of blood alcohol level was admitted according to the three-prong predicate of *Robertson*.[14] This Court held that "the common law approach (the three-prong predicate) and the presumptions are mutually exclusive to the extent that the presumptions are specifically contingent upon compliance with the mandate for quality assurance of the implied consent law."[15]

The problem here is that, even though the blood alcohol evidence was not admitted in compliance with the implied consent law, the State had, and the Third District so approved, the benefit of the jury instruction on the presumption of impairment. Mr. Morales challenged below Rule 11D-8.012's continued viability, the State's failure to satisfy the *Robertson* predicate, and error in instructing the jury on the statutory presumptions of impairment in his new trial motion. I.B. at 17, R. 96-108, Mtn. for Corr. at 2. The State did not dispute in its opposition to Mr. Morales' new trial motion that Rule 11D-8.012 was deficient; the State justified the statutory presumption of impairment instruction with the common law analyses under *Bender* and *Robertson* to establish scientific predicate, <u>not</u> the Administrative Rule:

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[13] *Miles I*, 732 So. 2d at 353.

[14] *See Miles II*, 775 So. 2d at 953-54.

[15] *Id.*

> Finally, the defense claims that th[e trial c]ourt improperly instructed the jury on the presumptions of impairment based on a deficiency in the Rules. In support of this claim, the defense cites the case of *State v. Miles*, (citation omitted,) *State v. Townsend*, (citation omitted,) and *Searles v. State*, (citation omitted). In these cases, the District Courts ruled that Florida Administrative Code rule 11D-8.012 fails to adequate provide for the proper collection, storage and transportation of blood samples taken pursuant to the implied consent law. The courts also ruled, however, that the blood alcohol test results could still be admissible, so long as the State proved the blood test was reliable and performed by a qualified operator or qualified equipment, and presented expert testimony about the test's meaning, pursuant to *Robertson v. State*, 604 So. 2d 783 (Fla. 1992). *In each of these decisions, the courts stated that once the* Robertson *predicate is established, the State is entitled to the jury instruction on the presumption of impairment.* The courts have certified this issue to the Florida Supreme Court. . . .The State would submit that in this case, the Robertson predicate was met. R. 115 (emphasis added).
>
> On appeal, Mr. Morales again referenced and argued:
>
> [i]n *State v. Sandt, State v. Townsend*, and *State v. Miles*[16] the courts held that in light of the rules' deficiencies, the State would be entitled to the statutory presumption only after laying the three-prong predicate described in *Bender*. I.B. at 25.

Upon their being decided by this Court, Mr. Morales clarified that these decisions already held the Administrative Rule, subsection (3) at issue here, to be inadequate.[17]

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[16] *State v. Sandt*, 751 So. 2d 136 (Fla. 2d DCA 2000), *approved in part and quashed in part*, 774 So. 2d 692 (Fla. 2000); *State v. Townsend*, 746 So. 2d 495 (Fla. 2d DCA 1999), *approved in part and quashed in part*, 774 So. 2d 693 (Fla. 2000); *State v. Miles*, 732 So. 2d 350 (Fla. 1st DCA), *approved in part and quashed in part*, 775 So. 2d 950, 952 (Fla. 2000).

[17] *See also* Reply Brief, at 1, 6-7, 10-11 (referencing this Court's *Miles* decision, decided after the filing of Mr. Morales' initial brief).

Important here, in the First District *Miles I* decision,[18]

> The only question raised. . .was *whether the rule relating to preservation of blood samples* drawn pursuant to section 316.1933, Florida Statutes (1995), *adequately protects* ***the due process rights*** *of those persons charged with driving under the influence of alcohol*. *In this regard, the trial court found the rule adopted by the FDLE for collection of blood samples is inadequate to address the core policies of the state to ensure preservation of a blood sample which will result in an accurate analysis*. Based on this finding, the trial court ruled the state was not entitled to a presumption under section 316.1934, Florida Statutes. The trial court also denied appellee's motion to suppress or alternative motion to exclude the blood-alcohol test results. Rather, the court ruled that at the trial of this cause, the parties will be permitted to establish or discredit the accuracy of the blood-alcohol test results in accordance with the principles articulated in *Robertson v. State* , 604 So. 2d 783 (Fla. 1992).

Miles I affirmed the trial court's decision that:

> regarding the inadequacy of the [Administrative R]ule to provide for the preservation of the sample. *See Miles*, 732 So. 2d at 353. However, the First District held that the legislatively created presumptions will be applicable upon admissibility of the sample according to the dictates of *Robertson*, and thus certified th[at] question [to the Florida Supreme Court]. *See id.*[19]

Mr. Morales also requested certification of this identical issue in his initial brief.

I.B. at 26.[20] Which this Court later resolved in *Miles II* in Mr. Morales' favor:

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[18] *State v. Miles*, 732 So. 2d at 350 (emphasis added).

[19] *State v. Miles*, 775 So. 2d 950, 952 (Fla. 2000).

[20] Mr. Morales wrote, I.B. at 26:

> To the extent this Honorable Court concludes this evidence is sufficient scientific predicate, the following question has been certified to the Florida Supreme Court by the *Miles*, *Townsend* and *Sandt* courts, the supreme court has accepted jurisdiction over this issue, and Mr. Morales

We have for review *State v. Miles*, 732 So. 2d 350 (Fla. 1st DCA 1999), wherein the court certified the following question to be of great public importance:

> WHERE THE STATE LAYS THE THREE-PRONGED PREDICATE FOR ADMISSIBILITY OF BLOOD-ALCOHOL TEST RESULTS IN ACCORDANCE WITH THE ANALYSIS SET FORTH IN *ROBERTSON V. STATE*, 604 So. 2d 783 (FLA. 1992), THEREBY ESTABLISHING THE SCIENTIFIC RELIABILITY OF THE BLOOD-ALCOHOL TEST RESULTS, *IS THE STATE ENTITLED TO THE LEGISLATIVELY CREATED PRESUMPTIONS OF IMPAIRMENT*?[21]

732 So. 2d at 353. We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. For the reasons stated below, *we answer the certified question in the negative*.[22]

* * *

Initially, we conclude that the First District did not err in approving the finding of the trial court that rule 11D-8.012 does not comply with Bender *and therefore may not give rise to the statutory presumptions associated with the implied consent law*.

* * *

Hence, as found by the trial court, the absence of maintenance standards renders rule 11D-8.012(3) inadequate and inconsistent with the purpose of the implied consent law as it relates to ensuring the reliability of test results. *As such, the State is not entitled to the presumptions of*

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requests that this Court also certify the following to the Florida Supreme Court as a question of great public importance:

> Where the State lays the three-pronged predicate for admissibility of blood-alcohol test results in accordance with the analysis set forth in *Robertson v. State*, 604 So. 2d 783 (Fla. 1992), thereby establishing the scientific reliability of the blood-alcohol test results, is the state entitled to the legislatively created presumptions of impairment?

[21] A constitutional violation, such as due process, can even be raised for the first time on appeal. "Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case." *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1983).

[22] *State v. Miles*, 775 So. 2d at952, 953-54, 955.

impairment associated with the implied consent statutory scheme.[23]

Miles I and *Miles II* make clear that, what gets the State the jury instruction on the presumptions of impairment is not mere admissibility of evidence on BAL that may or may not satisfy the *Robertson* three-pronged analysis, but the State's satisfaction of ***this specific Administrative Rule.*** And in *Bender*, this Court stated, "[n]one of the statutory presumptions can apply in the absence of compliance with the administrative rules."[24] The *Bender* Court was talking about failure to comply with existing rules. In *Robertson*[25] and *State v. Strong*[26] the Court was also dealing with alleged violations of existing statutes and rules.

The Third District misapprehended the above decisions. The Third District *Morales* decision affirms the jury instruction under the same administrative rule in effect that this Court has disapproved. The Third District *Morales* decision cannot stand. Mr. Morales is entitled to a new trial because it cannot be said that the State's use of the statutory presumption of impairment here did not contribute to this verdict. Because "there is no way of analyzing the jury's verdict to determine the theory upon

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[23] *State v. Miles*, 775 So. 2d 950, 952, 953-54, 955 (Fla. 2000).

[24] *State v. Bender*, 382 So. 2d 697, 700 (Fla. 1980).

[25] *Robertson*, 604 So. 2d at 783.

[26] *State v. Strong*, 504 So. 2d 758 (Fla. 1992).

which it relied in rendering its verdict,[27] and if it relied upon the statutory presumptions it was error under *Miles*."[28] The statutory presumptions jury instruction that *Miles II* explained could not be given under the pre-amended version of Rule 11D-8.012 cannot be harmless here, where it shifted the State's burden of guilt onto Mr. Morales by way of a presumption of impairment[29] in direct violation of his constitutional rights to due

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[27] The State relied upon both statutory (based on BAL) and non-statutory theories of impairment during trial and in closing argument.

[28] *Compare Servis v. State*, 2001 Fla. App. LEXIS 15155; 26 Fla. L. Weekly D 2570 (Fla. 5th DCA Oct. 26, 2001); *Hembree v. State*, 790 So. 2d 590 (Fla. 5th DCA 2001) (applying *Miles II* and reversing for new trial because of error in giving statutory presumption jury instruction though State failed to comply with Administrative Rule 11D-8.012); *Rafferty v. State*, 2001 Fla. App. LEXIS 10808; 26 Fla. L. Weekly D 1864 (Fla. 2d DCA Aug. 1, 2001) (same); *Cameron v. State*, 2001 Fla. App. LEXIS 9798; 26 Fla. L. Weekly D 1748 (Fla. 4th DCA 1748) *with Morales v. State*, 785 So. 2d 612 (Fla. 3d DCA 2001).

[29] Section 316.1933, Fla. Stat., provides:

(2) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal faculties, the results of any test administered in accordance with s. 316.1932 or s. 316.1933 and this section are admissible into evidence when otherwise admissible, and the amount of alcohol in the person's blood or breath at the time alleged, as shown by chemical analysis of the person's blood, or by chemical or physical test of the person's breath, gives rise to the following presumptions:

(c) If there was at that time 0.08 percent or more by weight of alcohol in the person's blood or breath, that fact ***shall*** *be prima facie evidence* that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired. Moreover, such person who has a blood or breath alcohol level of 0.08 percent or above *is guilty* of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood or breath alcohol level.

process and presumed innocence.[30]

II. The Blood Alcohol Level Readings Should Not Have Been Admitted into Evidence Where the Blood Alcohol Test Results Were Predicated on Methods that Failed to Substantially Satisfy the Criteria of Rule 11D-8.012, Fla. Admin. Code, or Alternative Admission with Adequate Scientific Predicate.

Mr. Morales moved in limine to exclude the results of his blood-alcohol test due to the detected non-compliance with the FDLE regulations for the collection of blood samples, specifically the lack of any testimony that these specific vials had anti-coagulants. The evidence of Mr. Morales' blood alcohol level was not properly admitted in accordance with the implied consent law or the three-prong test enunciated in *Robertson* and *Bender*.

There are two presumptions contained in § 316.1934, Florida Statutes. First, an

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> Under federal and Florida law, due process guarantees to protect a criminal defendant from conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'
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> * * *
>
> The constitutionality of an inference depends on whether there is a reasonable, logical, rational and direct relationship between the proven fact and the inferred fact. If not, the inference violates due process, for it creates the risk of an erroneous factual determination and thus excuses the prosecution from proving every element beyond a reasonable doubt. A constitutionally valid inference requires a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from the former.

State v. Rolle, 560 So. 2d 1154, 1158-59 (Fla.), *cert. den'd*, 498 U.S. 867 (1990).

an express presumption concerning intoxication and, second, an implied presumption regarding admissibility.[31] In *Robertson*, the Court had held that in order to admit test results, it must be established that (1) the test was ***reliable***, (2) the test was performed by a qualified operator with the proper equipment, and (3) expert testimony was presented concerning the meaning of the test.[32] The *Robertson* Court analyzed the implied consent law with particular focus on the principles set forth in *Bender*,[33] wherein the Court expressly recognized that the implied consent law includes an exclusionary rule prohibiting the ***use*** of blood-test results taken contrary to its core policies: "The test results are *admissible* into evidence *only* upon compliance with the statutory provisions and the administrative rules enacted by its authority."[34] The *Robertson* Court explained what that language in *Bender* meant:

Bender[35] noted that, prior to the adoption of the implied consent law,

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[31] *See Bender*, 382 So. 2d at 699.

[32] *Robertson*, 604 So. 2d at 789 (citing *State v. Bender*, 382 So. 2d 697, 699 (Fla. 1980)).

[33] *State v. Bender*, 382 So. 2d 697 (Fla. 1980).

[34] *State v. Bender*, 382 So. 2d 697 (emphasis added); *Accord State v. Strong*, 504 So. 2d 758 (Fla. 1987); *State v. Gillman*, 390 So. 2d 62 (Fla. 1980).

[35] In *State v. Bender*, 382 So. 2d at 697, the respondent argued that the presumption statute was unconstitutional and the failure of the department to incorporate the manufacturer's procedure for operation and maintenance of the breathalyser within its rules constituted a denial of due process. The supreme court (1) held the statute adopting the statutory presumptions was constitutional; (2) stated that test results are admissible and statutory presumptions are applicable if

> scientific test results for intoxication were admissible if a proper predicate established that (1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment and (3) expert testimony was presented concerning the meaning of the test.[36]

The former procedure required the state to establish the *Bender* predicate in every case. "If the state failed to do so, the evidence was not admissible."[37] *Robertson* set forth the following analytical framework instead:

> As a result, all presumptions created by the implied consent law do not apply and the state will bear the burden of establishing that the expert was genuinely qualified to conduct and interpret the test, among the other *Bender* requirements. *If the state does not shoulder this burden, or if the defense rebuts the state's evidence in this regard, then the test results will be inadmissible. Moreover, once such testimony is admitted, the defense will be entitled to challenge its reliability*, including attempting to impeach the expert for being unlicensed. In effect, the admissibility of such evidence will be determined as though the implied consent statute did not exist and the HRS regulations were of no legal force.[38]

If *Robinson* means what it appears to say, then it is clear from the State's expert testimony that it was error here to admit Mr. Morales' blood test results because of

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compliance with the statute and administrative rules is accomplished; (3) determined that application of the statutory presumptions did not deny a defendant due process, because "the presumptions are rebuttable and a defendant may attack the reliability of the testing procedures"; and (4) determined that the failure to adopt certain rules relating to the testing procedure did not constitute a denial of due process because "the respondents clearly have the right in their individual proceedings to attack the reliability of the testing procedures or operator's qualifications." *Id*. at 700.

[36] *See Robertson*, 604 So. 2d at 789 (quoting *Bender*, 382 So. 2d at 699).

[37] *See Robertson*, 604 So. 2d at 789.

[38] *Robertson*, 604 So. 2d at 791 (emphasis added).

the State's failure to carry its burden to show sample stability and reliability. Because the integrity of the blood samples may have been compromised by the failure to ensure the samples contained the preservative-anti-coagulant powder before they were tested. The storage conditions reflect noncompliance with the implied consent law. Accordingly, the trial court erred in granting the State statutory presumptions of *admissibility* of the blood alcohol test results.

None of the State's witnesses – not Officer Kaloostian, Mr. Roman, Richard McClure or Chris Walls – could confirm that an anti-coagulant was in the vials containing what was believed to be Mr. Morales' blood. Notably, State witness Richard McClure, toxicologist with Miami-Dade County, testified he used a gas chromatograph and analyzed the blood in two vials, in a blood collection kit, with assigned case number 98-0487, submitted by Florida Marine Patrol Officer Curt Kaloostian. T. 506-11. The defense objected and sought to exclude the blood sample, citing Florida Administrative Code Section 11D 8.012, because there was no testimony by the person collecting the sample that the blood was placed in a tube actually containing anti-coagulant substance, which the court overruled. T. 512-13.

Mr. McClure testified that these gray stopper vials used for these blood kits generally contained the anticoagulant powder that keeps the blood from clotting or clumping together, and this blood was in a liquid state. T. 513-15. He further testified that, if the blood did not contain anticoagulants, it would not be in a liquid state. T.

514. However, the defense confirmed during its voir dire that Mr. McClure was not at the collection point of the evidence and admitted that, other than the fact that the samples are not clotted, he had no idea whether these tubes contained anticoagulants. T. 516. Mr. McClure performed no test to confirm that the substance he analyzed was blood. T. 515. The defense further confirmed that Mr. McClure thought it was blood because it had the same consistency. T. 515.

South Shore Hospital emergency room nurse, Alexander Roman, testified that on September 27, 1998, he drew the blood of *someone* whom Officer Kaloostian brought in to the emergency room. T. 484-87, 488. He could not be certain Mr. Morales was that person. T. 487. Officer Kaloostian brought his own blood draw kit. T. 488-89. Mr. Roman identified his handwriting on the vials of the blood he collected for Officer Kaloostian that day. T. 489-91.

Additionally, the blood alcohol test results of Mr. Morales did not yield an unlawful blood-alcohol level of .08, as set forth under the statute. It is true that forensic toxicologist, Chip Walls, testified even one drink can impair a person, without the person being intoxicated, first affecting the thinking parts of the brain, then motor coordination and possibly leading to death due to respiratory depression. T. 660-67. But it is also true that he testified that someone who drinks regularly develops a tolerance to some of the effect of alcohol. T. 686, 713-14.

Mr. Walls further testified that, while the field sobriety tests were useful tools

in determining whether someone was impaired by alcohol, with the greater the impairment related to the poorer performance on those tests, T. 671-72, 715, a language barrier could also affect the results of the tests. T. 695-96. Mr. Walls also testified the person being tested could have normal faculties but not understand the question. T. 697. And the officer conducting the test could not be sufficiently trained or properly conducting the sobriety tests to yield reliable results. T. 699-700.

Finally, Mr. Walls testified that, without more information, he could not state with scientific certainty what Mr. Morales' blood alcohol was at the time of the collision. T. 701. The most important information was the time of the last drink and the type of food consumption, which would affect the peak or height of the alcohol concentration. T. 702-03.

> Well, the number of drinking scenarios could be quite complex. As I have said earlier, in my opinion *there's three possibilities that it could have been. It could have been* ***lower at the time of the accident****, it could have been essentially equal to the blood alcohol level found, or it could have been higher than we found at 6:50* [p.m.]. T. 704-06, 710 (emphasis added).

Mr. Walls further agreed that a lower blood alcohol level at the time of the collision that was rising could also mean *a lower impairment* that was rising at the time of the collision:

> Q. *And because it's possible under the scenarios that the prosecutor and [the defense] have given you that the blood alcohol level would be below an 07 at the time of the accident, the person's impairment at the time of the accident would also be less*, true?

A. *Generally that's true*. Again, as I mentioned earlier, if the blood alcohol level is rising rapidly then the rate of the rise could be more of a predictor of impairment then just the number itself.

Q. And I guess really the last question that I am going to ask you is *because of the lack of information that we have here, the three scenarios that you have explained to this jury are at this point in time three equally possible scenarios*, correct?

A. *Yes*. The more information you have, the more specific you can be. T. 710-11 (emphasis added).

Mr. Walls also testified it was possible for someone with a blood alcohol level of .07 to have had a lower blood alcohol content at the time of the collision. T. 679-84.

The State's noncompliance here was more than mere technicality. *Anticoagulant prevents change in alcohol concentration*, and prevents chemical oxidation of the blood.[39] The *Miles I*[40] court noted that the administrative rules were inadequate to ensure preservation of blood samples, possibly leading to inaccurate results. Without testimony on actual presence of the anticoagulant-preservative powder, this was tantamount to presenting blood test results lacking in the requisite scientific predicates of stability and reliability.

Respectfully, this cannot be deemed harmless. By analogy, the three methods of showing driving under the influence violation under § 316.193(1) are joined with the disjunctive "or" and are genuine alternatives. Of the three alternatives for showing a

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[39] *State v.* Miles, 732 So. 2d 350 (Fla. 1st DCA 1999) (Miles I), *approved in part and quashed in part*, 775 So. 2d 950 (Fla. 2000) (Miles II).

[40] *Miles I*, 732 So. 2d at 353.

violation under subsection (1) of § 316.193, only the text of subsection (1)(a) requires a showing that alcohol demonstrably affected the "normal faculties," *i.e.*, a showing of actual impairment. The alternative crimes in subsections (1)(b) and (1)(c) lack any textual requirement of visible impairment, depending solely on chemical analyses of blood or breath to show a specific concentration or level of alcohol in the driver's circulatory or respiratory systems.[41]

Here, Mr. McClure reported the blood alcohol test readings on October 9, 1998 to be: .0749, .0723, .0753 and .0726, with a final report of a blood alcohol level of .07. T. 519-20, 522. *None* of the samples had .08 or higher alcohol levels. T. 523-24. December 3, 1998 tests also performed on these samples showed no presence of controlled substances. T. 520-22. So "visible impairment" would have been the only remaining alternative for Mr. Morales' conviction. And "visible impairment" evidence here was questionable at best.

Ivana Posada testified she had to call "911" twice, the first time to help the victim and the second time because the individuals with the victim were raging after Mr. Morales. T. 268-69, 279. Mr. Fernandez did not know if Mr. Morales' difficulty in standing was the result of his hitting him in the ribs, and might be a "possibility".

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[41] *See State v. Rolle*, 560 So. 2d 1154, 1156 (Fla. 1990) ("section 316.193 allows proof of a blood-alcohol level ... to be substituted for proof of impairment--not as an unconstitutional presumption, but as an alternate element of the offense.").

T. 351. Three other men with Mr. Fernandez attacked Mr. Morales as well, preventing anyone from helping the victim now lying on the beach. T. 352. Mr. Fernandez was not going to let Mr. Morales near the victim. T. 352. Mr. Fernandez punched Mr. Morales "in his face", then testified he did not hit him in the face, but in his neck and back. T. 330, 332, 351. He also hit Mr. Morales in the ribs. T. 351.

Leonardo Guzman's testimony was similar. T. 631-40, 647. Almost immediately from the time Mr. Morales returned in his boat, Mr. Guzman saw at least two men pull him from the boat and start to beat him. T. 653-54. Mr. Guzman could not focus on Mr. Morales' faculties to determine whether he was impaired because, almost from the time Mr. Morales arrived, he was pulled out of the boat and beaten. T. 655-56.

Also, U.S. Coast Guard Officer Lamenza was roughly one foot from Mr. Morales, and he did not smell alcohol. T. 382-83. Officer Ludwig checked on his DUI test report that Mr. Morales' face was flushed and his eyes were bloodshot, but agreed the photograph reflected someone who had been out in the sun all day and that he could not say his bloodshot eyes were not a product of being on salt water all day. T. 437-38, 445-46, 479. Once inside the Coast Guard station, Officer Lamenza testified Mr. Morales was able to talk to Officer Lamenza in a direct manner, he was cooperative, he answered the questions presented to him and he was very serious. T. 391-93.

The Fifth District Court of Appeal's definition of "under the influence" in *State v. Brown*, 725 So. 2d 441 (Fla. 5th DCA 1999), provides useful guidance. In *Brown*, the district court stated that the phrase "under the influence of alcoholic beverages" is synonymous with being "impaired" by alcohol, and that being impaired meant something more than simply having consumed alcohol. In *Brown*, the defendant's blood was tested under § 316.1933(1), because the officer believed that the defendant caused fatal injuries to a bicyclist while the defendant was driving under the influence of alcohol. Similar to § 316.1932(1)(c), this section required the officer to have probable cause to believe that the driver was "under the influence of alcoholic beverages." The Fifth District noted that:

> The statute does not define what is meant by 'under the influence of alcoholic beverages,' nor does it go on and say, as does section 316.193 to the extent that the person's 'normal faculties are impaired.' We agree with the trial judge in this case that 'under the influence' means something more than just having consumed an alcoholic beverage.[42]

The court in *Brown* went on to discuss the meaning of "under the influence" as defined in Black's Law Dictionary:

> 'Under the influence' . . . as used by statutes or ordinances,...covers not only all well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess. Any condition where intoxicating liquor has so far affected the nervous system, brain or muscles of the driver so as

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[42] *Id*. at 443.

> to impair, to an appreciable degree, his ability to operate his automobile in the manner that an ordinary, prudent and cautious man, in full possession of his faculties, using reasonable care, would operate or drive under like conditions.[43]

Section 316.193, Florida Statutes, prohibits a person from driving or being in physical control of a vehicle while under the influence of alcoholic beverages or chemical or controlled substances (DUI). A person is deemed to be under the influence of alcoholic beverages when (1) affected to the extent that the person's normal faculties are impaired or (2) when the person has a blood-alcohol level of 0.08 percent or higher. The presence of an odor of alcohol alone is generally not considered an accurate and reliable measure of impairment and, thus, is rarely deemed sufficient for a finding of probable cause, and plainly not a finding of guilt beyond a reasonable doubt.[44] Generally, the odor of alcohol must be combined with other

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[43] 725 So. 2d at 443 (quoting Black's Law Dictionary 1369 (5th ed. 1979)).

[44] Black's Law Dictionary provides the following:

> Reasonable and probable cause. Such grounds as justify any one in suspecting another of a crime, and placing him in custody thereon. It is a suspicion founded upon circumstances sufficiently strong to warrant reasonable man in belief that charge is true. *Henry v. U.S.*, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134; *Com. v. Stewart*, 358 Mass. 747, 267 N.E.2d 213. *See also* Probable cause.
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> * * *
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> Reasonable cause. As a basis for arrest without warrant, is such state of facts as would lead man of ordinary care and prudence to believe and conscientiously entertain honest and strong suspicion that person sought to be arrested is guilty of crime. *People v. Newell*, 272 Cal. App. 2d 638, 77 Cal. Rptr. 771, 773. *See also* Probable cause;

factors to show "impairment".[45] While the odor of alcohol on a driver's breath is considered a critical factor, other components central to developing probable cause may include the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises.[46]

> Reasonable and probable cause; Reasonable belief.
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> * * *
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> Probable cause. Reasonable cause; having more evidence for than against. A reasonable ground for belief in the existence of facts warranting the proceedings complained of. An apparent state of facts found to exist upon reasonable inquiry (that is, such inquiry as the given case renders convenient and proper), which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, *Cook v. Singer Sewing Mach. Co.*, 138 Cal. App. 418, 32 P.2d 430, 431. See also Information and belief; Reasonable and probable cause; Reasonable belief; Reasonable grounds.

[45] *See Demers and Gayle*, Florida DUI Handbook § 4.6(c) (1999).

[46] *Compare State v. Kolb*, 7 Fla. L. Weekly Supp. 548 (Fla. 12th Jud. Cir. 2000)("It is uncontradicted that odor alone is evidence of nothing more than the subject had, at some point, ingested a beverage that may have contained alcohol. Even a trained law enforcement officer cannot determine how much a person has had to drink, or when, simply from the odor of alcohol. Certainly, the odor, without more, is no indication of impairment."); *State v. Longacre*, 2 Fla. L. Weekly Supp. 571 (Fla. 11th Jud. Cir. 1994) (odor of alcohol, without evidence of impairment, not sufficient to establish probable cause necessary to require driver to submit to field sobriety test); *Davis v. State*, 40 Fla. Supp. 2d 35, 36 (Fla. 15th Jud. Cir. 1989); *State v. Marshall*, 36 Fla. Supp. 2d 34, 35 (Fla. 4th Jud. Cir. 1989)(mere odor of alcohol, absent other sufficient indicia of impairment, does not provide requisite probable cause for field sobriety tests); *Chait v. State*, 27 Fla. Supp. 2d 115 (Fla. 11th Cir. 1988)(traffic accident and odor of alcohol, without more, did not constitute probable cause for DUI arrest); *People v. Roybal*, 655 P.2d 410, 413 (Colo. 1982) (odor of alcoholic beverages is not inconsistent with

But here, Mr. Morales did not lose his balance or use his arms for balance or stumble or fall. T. 465-71. Officer Ludwig performed a series of field sobriety tests, not specifically recalling how Mr. Morales performed on these tests, but referred to his test report and recalled that Mr. Morales did not complete these tasks without error. T. 419-27. Yet, Officer Ludwig did not know how many errors Mr. Morales made on his DUI tests and took no notes on specifically what Mr. Morales could not do. T. 455-69.

Based on Mr. Morales' conduct on these tests, his eyes, and his alcohol odor, Officer Ludwig thought Mr. Morales was under the influence and impaired by alcohol. T. 427, 431, 471, 483-84. So he turned Mr. Morales over to Florida Marine Patrol Officer Curt Kaloostian. T. 429. Yet, Officer Ludwig marked on the test report that

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ability to operate a motor vehicle in compliance with the law) *with State v. Cesaretti*, 632 So. 2d 1105 (Fla. 4th DCA 1994)(officer had cause to request blood test of motorist who had odor of alcohol on her breath and caused serious bodily injury); *State v. Silver*, 498 So. 2d 580 (Fla. 4th DCA 1986)(officer authorized to order blood sample from defendant who had odor of alcohol on breath and was driver of vehicle involved in traffic fatality); *Williams v. State*, 731 So. 2d 48 (Fla. 2d DCA 1999)(smell of alcohol on defendant's breath, coupled with traffic fatality and statement that defendant was driver, gave officer probable cause to draw defendant's blood); *State v. Brown*, 725 So. 2d 441 (Fla. 5th DCA 1999) (police had probable cause to order blood test of driver who had collided with bicyclist and officer observed that driver had odor of alcohol on breath and blood-shot eyes); Keeton v. State, 525 So. 2d 912 (Fla. 2d DCA 1988)(probable cause to administer blood test existed where officers smelled strong odor of alcoholic beverages on defendant's breath and defendant operated vehicle which caused at least one death); *Jackson v. State*, 456 So. 2d 916 (Fla. 1st DCA 1984)(state met burden of proving probable cause where trooper smelled alcohol on defendant's breath and knew defendant was driver of motor vehicle which caused a death).

Mr. Morales' speech was confused, not that it was slurred or mumbled, because he did not understand everything Mr. Morales was telling him and agreed that could have been Mr. Morales' inability to speak much English and Officer Ludwig's inability to speak any Spanish. T. 474-76. Officer Ludwig also agreed this did not necessarily indicate Mr. Morales was impaired. T. 476.

Mr. Morales cooperated in every way, did not cause any problems, was not insulting, and never fell asleep on the boat or at the station. T. 434-35, 447-49. Mr. Morales was able to follow all directions, but required translations. T. 449, 452-54. U.S. Coast Guard Officer Ludwig confirmed that Mr. Morales only had a sixth grade education. T. 441-42. Officer Lamenza noticed Mr. Morales' very poor grammar and the handwriting made his statement very difficult to understand, not in the manner of an educated man. T. 377-78, 394-97. Officer Ludwig admitted that the fact that Mr. Morales could communicate intelligently in English, not his primary language, and Officer Ludwig was able to largely understand the details of the accident was another factor that he was in control of his normal faculties. T. 472-74. So the verdict based on .08 alcohol level at the time of the collision was flatly unsupported.[47] And it was questionable that it could have even been supported on the basis of "visible impairment". Accordingly, the admission of Mr. Morales' test results was prejudicial error.

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[47] Rule 3.600(a)(2); *Barwick v. State*, 660 So. 2d 685, 694 (Fla. 1995).

III. It Was Error for the Trial Court to Twice Inform the Jury that it Would Be a Time-Consuming Procedure to Reread Testimony to Them During Their Deliberations.

The defense raised its concern about the court's instruction to the jury panel in the beginning of trial regarding the difficulty of reading testimony back to the jury[48] and requested that the court instruction prior to their deliberations that it is within the jury's province to request that testimony be read back. T. 766. The court stated: "All right. Bring in the jury" for closing arguments. T. 766.

After closing arguments, the court charged the jury the following morning. Though requested, the jury instructions, neither as written nor as read, corrected the court's instructions to the jury at the beginning of trial on the difficulty of reading testimony back to the jury, and did not make clear that it is within the jury's province to request that testimony be read back. R. 67-91, T. 839-56. The court further instructed the jury:

> I know that during the trial there have been references during the testimony to perhaps a report or deposition or some other document. If

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[48] The court told the jury pool the following:
Now, I want to remind you that although Ms. Balch 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. T. 9.

> you do not have that in the jury room with you, then the document itself was not admitted into evidence. So if you ask me to see that document, the only answer I can give you is that you can't have it since it's not in evidence. T. 855.

After charging the jury, the defense renewed its objection to the court's instruction:

> it's a difficult and time-consuming process to have testimony read back. I know [the court is] informing the[jury] that they can do it, but I feel in a way it's a comment that unintentionally perhaps – unintentionally not perhaps, it just may discourage them from doing it. So I object. T. 858.

The record contains a miscellaneous excerpt, filed February 25, 2000, of instructions to the jury that testimony can be reread but "it is a difficult and time-consuming process"; there is no indication at what point the jury was so instructed. R. 122-24.

The Third District Court of Appeal held in *Simmons v. State*[49] that the rereading of testimony was within the trial court's discretion and not harmful error absent a request by the jury to have testimony reread. The Third District later explained in *Rodriguez v. State*[50] that the "discretion cannot be properly exercised without knowing the nature of the request." Thereafter, the Third District held, in *Diaz v. State*,[51] that such an error is "technically ill-advised, see Fla.R.Crim.P. 3.410, [but] cannot result in reversal in the absence of preservation below."

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[49] *Simmons v. State*, 334 So. 2d 265 (Fla. 3d DCA 1976).

[50] *Rodriguez v. State*, 559 So. 2d 678 (Fla. 3d DCA 1990).

[51] *Diaz v. State*, 567 So. 2d 18 (Fla. 3d DCA 1990).

In *Hendrickson v. State*,[52] where defense counsel failed to object, the Fourth District Court of Appeal held that the giving of the following preliminary instruction was fundamental error:

> Number three, prospective jurors are not allowed to ask the court reporter during the deliberation process to have the court reporter read back to you the testimony of any of the witnesses. You have to listen very carefully and attentively to what the witnesses have to say because you're only going to hear it once.

Earlier, the Fourth District in *Biscardi v. State*[53] and *Huhn v. State*[54] where defense counsel had voiced an objection, held that similar instructions which indicated to the jury that there was really no provision for reinstruction of the jury or review of testimony, particularly where the trial court had earlier refused to advise the jury it could take notes, was harmful error because the comments may reasonably have conveyed to the jurors that to ask for clarification of instructions or rereading of testimony would be futile or was prohibited. In *Huhn* the trial judge instructed the jury:

> Also, there is really no provision for me to either reinstruct you after I instruct you or certainly to have any testimony read back or certainly to call any witnesses back. You are going to have to remember the testimony and the instructions on the law as best you can and probably the next time we hear from you will be when that buzzer in there rings and we all jump about a foot up in the air and then, you have a verdict.[55]

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[52] *Hendrickson v. State*, 556 So. 2d 440, 441 (Fla. 4th DCA 1990).

[53] *Biscardi v. State*, 511 So. 2d 575, 580-81 (Fla. 4th DCA 1987).

[54] *Huhn v. State*, 511 So.2d 583, 591 (Fla. 4th DCA 1987).

[55] *Huhn*, 511 So. 2d at 591.

Then, in *Farrow v. State*,[56] the Fourth District receded from *Hendrickson* by holding that such instructions were not fundamental error. The Fourth District, nevertheless, held that such instructions are in contravention of Florida Rule of Criminal Procedure 3.440, which Rule permits the readback of testimony, and thus error.

In *Rigdon v. State*,[57] defense counsel, as in this case, was deemed by the Fourth District to have properly preserved the issue for appellate review by objecting to the subject instruction when moving for a mistrial. Mr. Morales' defense counsel properly preserved the issue when he requested that the Court cure its initial instruction to the jury with an instruction correcting the mis-perception that testimony could not be read back, when he renewed his objection after the jury was charged and when he moved for new trial.

> Employing the reasoning underlying the foregoing cases, while the instruction given contains indications that there remained a possibility of having testimony read back, it nevertheless resembles the instruction condemned in the above cases because the trial judge's comments may reasonably have conveyed to the jurors that to ask for rereading of testimony would be futile or was prohibited. This was reversible error.[58]

Respectfully, the Court's guidance on the proper standard is necessary because the District Courts of Appeal are not settled on this issue. It is Mr. Morales' position that Judge Hersey's thoughtful analysis in *Rigdon*, above, should apply here and

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[56] *Farrow v. State*, 573 So. 2d 161 (Fla. 4th DCA 1990).

[57] *Rigdon v. State*, 621 So. 2d 475, 479-80 (Fla. 4th DCA 1993).

[58] *Rigdon v. State*, 621 So. 2d at 480.

warrant reversal and remand for a new trial. Jury deliberations are a sacrosanct and delicate part of our judicial system. Florida courts work to protect the deliberation process from outside influence. But, as a practical matter, what a judge says to a jury greatly impacts on them. Indeed, jurors are presumed to follow the trial judge's instructions and these jurors got the message as to how the judge wanted them to conduct their deliberations. A black robed judge who presides from an elevated bench amid formal judicial protocol, an already-imposing figure to members of the Bar, is even more so to any group of lay persons. A juror's intimidation to request re-reading of testimony prevents a complete airing of case merits because it strikes at the very foundation of a jury trial.

The disputed instruction carried the inescapable risk of penetrating the sanctity of the jury room and intimidating the jury.[59] This was a complicated trial with twelve witnesses and technical testimony, and not an "open and shut" case on the issues of intoxication and impairment, as already set forth. Mr. Morales respectfully requests that the Court speak on this issue, as courts cannot be satisfied beyond a reasonable doubt that this error did not contribute to the verdict here.[60]

CONCLUSION

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[59] *See generally Scoggins v. State*, 726 So. 2d 762, 767 (Fla. 1999).

[60] *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Ousley v. State*, 763 So. 2d 1256 (Fla. 3d DCA 2000).

For the reasons and legal authorities set forth herein, it is respectfully submitted that Petitioner RAUL MORALES' conviction on Boating Under the Influence/Homicide should be reversed and remanded because of multiple errors in instructions to the jury because of the erroneous admission of prejudicial evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was **mailed**/faxed/hand-delivered this 8th day of January, 2002 to: OFFICE OF THE ATTORNEY GENERAL, Department of Legal Affairs, Att: Frank Ingrassia, Esq., Assistant Attorney General, 110 S.E. 6th Street, 9th Floor, Fort Lauderdale, Florida 33301.

By: _____
Dorothy F. Easley, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the typeface and font size, Times Roman 14 point proportionately spaced, as set forth in Rule 9.210, Fla. R. App. P.

BY: _____

Dorothy F. Easley, Esq.