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 REPLY BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENTS

For the reasons and legal authority set forth herein and in Petitioners' initial brief, it is respectfully submitted that the conviction and judgment thereon for Boating Under the Influence/Homicide ("BUI") must be reversed and remanded.

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.

Constrained by page limitation, Mr. Morales corrects some inaccuracies in the State's facts and positions, and relies on his initial brief for all remaining corrections. As a threshold matter and the subject of Mr. Morales' pending motion to strike, the State of Florida twice before, in two different appellate pleadings, accepted Mr. Morales' statement of the case and facts as being "accurate".[1] The State of Florida and its counsel are legally and ethically bound by prior positions and admissions.[2] It

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[1]

> The *Appellee [State of Florida] accepts Appellant's facts* as a generally accurate account of the proceedings below.

Answer Brief of Appellee State of Florida at 2 (emphasis added).

> *The State accepts Petitioner's statement of the case and facts* as an accurate representation of the facts.

Jurisdictional Brief of Respondent, State of Florida, at 1 (emphasis added).

[2] *See Palm Beach Co. v. Palm Beach Estates*, 110 Fla. 77, 148 So. 544, 548 (Fla. 1933) ("where a party to a suit has assumed an attitude on a former appeal, and has carried the case to an appellate adjudication on a particular theory

is improper and prejudicial for the State to advance –as here– a new appellate posture argued neither at the trial court nor Third District Court of Appeal levels; particularly where Mr. Morales has based his appeal and the Third District has based its ruling on the State's earlier posture.[3] Thus, Mr. Morales respectfully requests that the Court grant his pending motion to strike and disregard, at a minimum, the State's newly-disputed statement of "facts" in Respondent's brief.

In reply to the State's argument that "[a]ll the parties [had until now incorrectly] argued the implied consent presumptions emanated from Section 316.1934(2), Fla. Stat. (1997)", dealing with motor vehicles rather than boats, Resp. B. at 17 n.2, Mr.

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asserted by the record on that appeal, he is estopped to assume in a pleading filed in a later phase of that same case, or another appeal, any other or inconsistent position toward the same parties and subject matter."); *Campbell v. Kauffman Milling Co.*, 42 Fla. 328, 29 So. 435 (1900) (party cannot take inconsistent position on appeal); *Kaufman v. Lassiter*, 616 So. 2d 491 (Fla. 4th DCA 1993) (same); *see also Action Manufacturing, Inc. v. Fairhaven Textile Corp.*, 790 F.2d 164, 165 (1st Cir. 1986); *PPX Enterprises, Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984); *Brown v. Tennessee Gas Pipeline Co.*, 623 F.2d 450, 454 (6th Cir. 1980) ("stipulation and admissions in the pleadings are generally binding on the parties and the Court"); *State Farm Mutual Automobile Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968) (". . . judicial admissions are binding for the purpose of the case in which the admissions are made including appeals."); *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir.1956); *Hill v. FTC*, 124 F.2d 104, 106 (5th Cir. 1941); *Best Canvas Products & Supplies v. Ploof Truck Lines*, 713 F.2d 618, 621 (11th Cir. 1983); *see also generally Seven-Up Bottling Co. v. Seven-Up Co.*, 420 F. Supp. 1246, 1250-51 (E.D. Mo. 1976), *aff'd*, 561 F.2d 1275 (8th Cir.1977); *Consolidated Rail Corp. v. Providence & Worcester Co.*, 540 F. Supp. 1210, 1220 (D. Del. 1982); *Giles v. St. Paul Fire & Marine Insurance Co.*, 405 F. Supp. 719, 725 n. 2 (N.D. Ala. 1975).

[3] *Id.*

Morales argued under both the motor vehicle and boating schemes (*see* Appellant's Initial Brief) because, while "[i]t is true that *Miles* and *Robertson* arose under the motor vehicle statutes and not the boating statutes, [] the two statutory schemes are identical and the result under the latter should be no different than the result under [the] former."[4] Compliance with Florida Department of Law Enforcement's ("FDLE") administrative rules under the implied consent laws is held essential because presumptions of impairment turn on overall process integrity.[5]

The State's latest permutations in appellate posture –suggesting no conflict with *Miles I & II*[6] because Mr. Morales' appeal turns not on the absence of blood preservative at issue in *Miles I & II,* but on the absence of anti-coagulant– reflect a fundamental misunderstanding of *Miles I & II*. *Miles I & II* were decided on due process inadequacy in the pre-amended-FDLE's rules and procedures as a whole. Moreover, the State's inability to adduce evidence that the anticoagulant/preservative

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[4] *Cameron v. State*, 2001 Fla. App. LEXIS 9798 *7-*8; 26 Fla. L. Weekly D 1748 (Fla. 4th DCA July 18, 2001) (reverse for new trial on all BUI counts because it was error for trial court to instruct jury on statutory presumptions of impairment where state did not opt to adduce blood alcohol test results complying with testing procedures set forth in section 327.354(3); accordingly, statutory presumption not available); *see generally Robertson v. State*, 604 So. 2d 783, 789, n.4 (Fla. 1992); *State v. Bender*, 382 So. 2d 697, 699-700 (Fla. 1980), *limited by, Robertson v. State*, 604 So. 2d 783 (Fla. 1992).

[5] *See State v. Miles*, 775 So. 2d 950 (Fla. 2000) (per curiam); *see also generally Robertson*, 604 So. 2d at 788-90; *Bender*, 382 So. 2d at 697-700.

[6] *State v. Miles*, 775 So. 2d at 950.

powder was actually in these vials at the time of collection was material noncompliance. *Anticoagulant prevents change in alcohol concentration and chemical oxidation of the blood*.[7] That is why this Court agreed with the First District in *Miles I* that the FDLE rules were inadequate in their failure to include specific measures to ensure reliable testing and analysis of blood samples – process integrity.[8]

> *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*.
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> * * *
>
> 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 impairment associated with the implied consent statutory scheme*.[9]

Thus, in *Miles II* the Court held 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 satisfied *Robertson*'s three-prong predicate:[10]

> *Robertson* thus stands for the rule that, in such instances, the State must revert back to the common law approach through the two provisos mentioned above. It is important to note that, as underlined above, *we*

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[7] *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*).

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

[9] *Miles II*, 775 So. 2d at 950, 952, 953-55.

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

> *made it clear that the statutory presumptions would not be applicable in such instances*. That was also evident in our emphasis in *Robertson* that *it would have been error for the trial court to have instructed the jury on any of the presumptions of the implied consent law once the State had to revert to the common law approach*.[11]

The State is one-hundred percent wrong to insist that *Miles I & II* only apply to cases where *Robertson's/Bender's* scientific predicate are not met, and parlay that erroneous interpretation into a circular, conclusory argument that, because the scientific predicate for admissibility of Mr. Morales' BAL results was somehow met here, *Miles* does not apply. Under *Miles I & II*, what gets the State the jury instruction on the presumptions of impairment is not mere admissibility of BAL evidence, which may (or may not) satisfy *Robertson's* three-pronged analysis, but the State's satisfaction of ***this specific Administrative Rule.*** The instruction can only be as good as the Rule. And if the pre-amended Rule is inadequate, so is the instruction premised on tests derived from that pre-amended Rule,[12] necessitating a new trial.

This is not Mr. Morales' novel interpretation. The Fifth District in *Bass v. State*[13] also understood *Miles I & II* to mean this.

In *State v. Miles*, 775 So. 2d 950 (Fla. 2000), the Florida Supreme Court

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[11] *Id.*

[12] *See also State v. Strong*, 504 So. 2d 758 (Fla. 1992); *Bender*, 382 So. 2d at 700.

[13] *Bass v. State*, 2001 Fla. App. LEXIS 17195 (Fla. 5th DCA Dec. 7, 2001).

found that the rules promulgated by the FDLE providing for the testing of blood samples were so deficient with respect to the proper preservation of the blood that the state could not use the statutory presumptions of impairment set forth in section 316.1934(2).[14]

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[14] *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).

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.

Miles I & II's application to Mr. Morales' facts no less warrants reversal for new trial than in *Bass, Servis, Hembree* and *Cameron*. First, *Miles I & II* concerned the same pre-amended rule as here– Rule 11D-8.012; preservative/anti-coagulant powder must actually be inside, not speculated into, these vials at the time of collection.[15] Second, none of the State's witnesses could testify here that anticoagulant powder was in vials containing what was assumed to be Mr. Morales' blood. South Shore Hospital emergency room nurse, Alexander Roman, testified he drew the blood of someone whom Florida Marine Patrol Officer Curt Kaloostian brought in to the emergency room. T. 484-87, 488. He could not be certain Mr. Morales was that person. T. 487. He testified Officer Kaloostian brought his own blood draw kit. T. 488-89. Miami-Dade County toxicologist, Richard McClure,

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> (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.

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

[15] FDLE Rule 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.

testified he analyzed the sample in two vials, in a blood collection kit, with assigned case number 98-0487, submitted by Officer Kaloostian. T. 506-11. He was not at the blood sample collection point and admitted that, other than the fact that the samples were not clotted, he had no idea whether these tubes contained anticoagulant powder. T. 516. And he performed no test to confirm that the substance he analyzed was blood. T. 515. 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 the anti-coagulant substance, which the court overruled. T. 512-13. The Third District misapprehended *Miles I & II* and these facts when it approved, unlike other District Courts of Appeal,[16] the giving of the presumption of impairment instruction on the same administrative rule that this Court disapproved in *Miles II*.

The State does not – and cannot – cite any cases holding that (1) a motion to suppress is a condition precedent to "preserve" already timely objections to the giving of a jury instruction and (2) renewal of a motion in limine is necessary to "preserve" already timely in limine motions and objections to evidence at the time the prejudicial evidence is admitted. *See* R. 112-17, 128, T. 512-13, 742-43, 746-47, 756-58, 764.

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[16] *Compare Servis*, 2001 Fla. App. LEXIS at 15155 (same); *Hembree*, 790 So. 2d at 590 (same); *Rafferty*, 2001 Fla. App. LEXIS at 10808 (same); *Cameron v. State*, 2001 Fla. App. LEXIS at 9798 (same) *with Morales v. State*, 785 So. 2d 612 (Fla. 3d DCA 2001).

Moreover, objections to jury instructions are preserved if they are lodged during the charge conference.[17] *Carpenter v. State*, 2001 Fla. LEXIS 405 at *44-46 (Mar. 1, 2001), held that objections during the charge conference sufficiently preserved the jury instruction issue for appellate review:

> The State asserts that even though defense counsel objected to the modified first-degree felony murder instruction during the jury charge conference, the issue has not been preserved for our review because (1) defense counsel did not renew the objection to the modified first-degree felony murder charge at the close of the charge conference or when the jury was instructed; and (2) the trial court granted defense counsel's request to give the jury a special instruction on accessory after the fact and independent acts. *See* Answer Brief at 17-18. Contrary to the State's position, however, the fact that defense counsel did not renew its objection to the jury instructions clearly does not bar review here. (Citations omitted). *It is clear that defense counsel satisfied the requirements of Florida Rule of Criminal Procedure 3.390(d) by objecting during the charge conference and specifically advising the trial court of the basis for the objection*.

In reply to the State's contention that Mr. Morales failed to raise these objections with specificity, Mr. Morales –before this Court decided *Miles*– challenged Rule 11D-8.012's continued viability with the same level of specificity held sufficient in *Bass*,[18] the State's failure to satisfy the *Robertson* predicate, and the error in instructing the jury on the statutory presumptions of impairment at trial. App. I.B. at 17, R. 96-108, Mtn. for Corr. at 2. And the State understood the objections. In fact,

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[17] Rule 1.470, Fla. R. Civ. P.; Rules 3.390(d) & (e), Fla. R. Crim. P.

[18] *Bass*, 2001 Fla. App. LEXIS at 17195 *2.

the State's opposition to Mr. Morales' new trial motion challenging Rule 11D-8.012 justified this statutory presumption of impairment instruction with the common law analyses under *Bender* and *Robertson* to establish scientific predicate, *sub silentio* admitting the Rule's recognized deficiency:

> 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*[19] 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

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[19] *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); *Miles I*, 732 So. 2d at 350, *approved in part and quashed in part, Miles II*, 775 So. 2d 950.

described in *Bender*. I.B. at 25.

Mr. Morales' appellate initial brief also requested certification of the same question certified in *Miles I*. I.B. at 26.[20] Which issue this Court later resolved in *Miles II* –post-filing of Mr. Morales' initial brief– in his favor.[21] Upon the Court deciding *Miles II*, Mr. Morales also argued the Administrative Rule's deficiencies at issue here and decided in *Miles II*.[22] *The record* belies any suggestion of waiver.

So it cannot seriously be argued that this issue is un-preserved where, as here, (1) Mr. Morales raised the same *Miles, Sandt* and *Townsend* arguments at the trial level, (2) raised them in his new trial motion, (3) the State understood and responded to them in their opposition to Mr. Morales' new trial motion, (4) the trial court ruled

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

[22] *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).

on those issues, (5) Mr. Morales requested certification of those issues (before *Miles II* had been decided) in his initial brief, (6) the State responded to those issues in its answer brief, (7) Mr. Morales included and argued *Miles I & II* in his reply brief (upon the Court deciding *Miles II*), (7) Mr. Morales filed his notice of supplemental authority of *Miles II* before oral argument, (8) the parties argued *Miles I & II* during oral argument, and (9) the parties argued *Miles I & II* on the motion for rehearing.

Even had Mr. Morales not raised these issues at trial, constitutional violations like the due process inadequacy of the FDLE rules here, can be raised for the first time on appeal.[23] "Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case."[24] Certainly decisions from Florida's highest court concerning the same substantive issues before a lower appellate court are an "item affecting the case".

The State's argument that the statutory presumption of impairment instruction was harmless because Mr. Morales' BAL results were never at .08 and, therefore, a jury could have never presumed impairment[25] strains credulity. The trial court ***denied***

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[23] *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1983).

[24] *Id*. (citing *Miami Gardens, Inc. v. Conway,* 102 So. 2d 622 (Fla. 1958); *Vance v. Bliss Properties, Inc.*, 109 Fla. 388, 149 So. 370 (1933)).

[25] 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

the defense judgment of acquittal motion on the Count I ".08 or above" blood alcohol portion because it concluded that a jury could reasonably infer Mr. Morales' BAL, never reaching .08 in test results, was, nevertheless, at .08 or higher during the accident to, upon *that inference*, *presume* impairment. T. 742-43, 746-47.

Mr. Morales replies two-fold to the State's suggestion that the intoxication and impairment evidence was overwhelming. First, the State's states recitation of facts to display this evidence as "overwhelming" is fanciful at best. Mr. Morales, constrained by page limitation, relies upon his motion to strike and his recitation of the facts, which the State twice before admitted were accurately recited, for all further corrections to the State's "facts". *See* Mr. Morales' I.B. on the Merits at 1-19. It merits belaboring that this was a complicated trial with twelve witnesses and technical testimony; and *not* an "open and shut" case on intoxication or impairment. *See* Mr. Morales' I.B. on the

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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.

Merits at 1-19. It cannot be said beyond a reasonable doubt that this instruction did not contribute to this verdict.[26]

Second, because "there is no way of analyzing the jury's verdict to determine the theory upon which it relied in rendering its verdict,[27] it cannot be said that the jury did not rely, in error, upon the statutory presumptions held to warrant reversal 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 in direct violation of his constitutional rights to due process and presumed innocence.[29]

The Respondent's brief merits no reply to Issues II and III. Mr. Morales relies

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[26] *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).

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

on his initial brief for all remaining points.

CONCLUSION

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 jury instructions and 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 28th day of February, 2002 to: OFFICE OF THE ATTORNEY GENERAL, Department of Legal Affairs, Attn: Michael Niemand, Esq., 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.