

IN THE SUPREME COURT OF FLORIDA

EDWIN MATOS,

CASE NO: SC05-887

Lower Trib. Case No: 4D03-2043

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

_____ /

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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TABLE OF CONTENT

| | <u>Page(s)</u> |
|-----------------------------------|----------------|
| Authorities cited | 1 |
| Statement of Case and Facts | 2-6 |
| Summary of Argument | 6-7 |

Argument

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS HONORABLE COURT.

| | |
|--------------------------------|-----|
| Argument | 7-9 |
| Conclusion | 10 |
| Certificate of Service | 10 |
| Certificate of Font Size | 10 |

AUTHORITIES CITED

| | |
|---|------|
| <u>Dodi Publishing v. Editorial America, S.A.</u> , 385 So.2d 1369 (Fla. 1980) | 7 |
| <u>Jenkins v. State</u> , 385 So.2d 1356 (Fla. 1980) | 7 |
| <u>Ramirez v. State</u> , 651 So.2d 1164 (Fla. 1995) | 6, 8 |
| <u>Ramirez v. State</u> , 810 So.2d 836 (Fla. 2001) | 6, 8 |
| <u>The Florida Star v. B.J.F.</u> , 530 So.2d 286 (Fla. 1988) | 7 |
| Article V, Section 3(b)(3), <u>Fla.Const.</u> (1980) | 7 |
| <u>Fla.R.App.P. 9.030(a)(2)(iv)</u> | 7 |

STATEMENT OF THE CASE AND FACTS

The appellant was charged by information with two counts of manslaughter, and two counts of vehicular homicide. (R-10-12) Pre-trial, the State gave notice that it intended to introduce evidence obtained from the Appellant's vehicle's Electronic Data Recorder/Sensing and Diagnostic Module, similar to what is commonly be referred to as the "black box" on a airplane. The petitioner filed a written objection. With both parties agreeing that a Frye hearing was necessary, the motion proceeded to a hearing before the trial court. (R-59-62, 69-76)

The State's expert witness, Donald Felicella, testified that he had been trained in the downloading of data from the SDM and knew how the SDM worked. He testified that the SDM could be placed on vehicles to record whatever you might want to record, similar to a "black box". (T12-31-32) In use since the 1970's, Felicella testified that the data was being used by auto manufacturers, accident reconstructionists, biomechanical engineers, and insurance companies. As to reliability studies, Felicella testified that studies had shown the SDM to be reliable, and that data from the SDM was generally accepted within the crash investigation community, in the insurance industry,

and by the National Highway Transportation and Safety Board. (T12-33, 37-38, 82-83) Felicella also testified that he did not know who manufactured the SDM in the instant case, that he could not testify as to any quality controls or its reliability when it left the factory, and that the SDM readings might be wrong based on a vehicles tire movement. He also testified that he did not know if a calibrated accelerometer was used in the SDM which could have affected the accuracy of the reading, and that the SDM data could be incorrect if the accident in the instant case occurred on an angle, which was present. (T12-88-89, 100-1-3, 129-130) Finally, Felicella testified that a hypertech machine, which was in use in petitioner's vehicle, could effect the SDM readings and that the petitioner's car having been modified into a "Firehawk" from a "TransAm" could cause some error in the speed reading from the SDM. (T12-132-133, 139) Felicella also testified that one paper he relied upon noted that there could be three ways that the internal workings of the SDM may cause the readings to be inaccurate. Finally, Felicella testified that the SDM was still evolving and undergoing changes. (T12-132-133, 139, 144, 151)

The State's second expert, Dr. Robert McElroy, testified that he had

published papers and articles on EDR and its function, and that the NHTSB and National Transportation Safety Association were using SDM in studies as was the Society of Automobile Engineers. Dr. McElroy also testified that the data collected was accepted within the auto industry, the NHTSA, and accident reconstructionist, although the information was not always available to the general public, and that various studies had found the SDM to be accurate. (T12-164, 170-171, 174-175, 189) Dr. McElroy testified that there were scenarios in which the SDM would not read speed, that there was tremendous room for improvement in the SDM, and that the SDM was not approved by the Florida DHSMV pursuant to Chapter 15 for purposes of testing for the speed of a vehicle, nor would there be a way for him to testify that the speed as reflected by the SDM fell within the parameters of admissibility pursuant to Chapter 15. (T13-217-218, 221-222, 223-223, 227-230) Finally, Dr. McElroy testified that he could not say whether the SDM was designed to be introduced in a court proceeding, and on the issue of being widely accepted, he could not say that a majority of accident reconstructionists were aware of the system to collect data from an SDM. He also testified that he could not say how many times the SDM had

malfunctioned, and that the data reflected the electronic system of the car, no more, no less. (T13-231, 238-239, 242, 248) The petitioner presented no witnesses at the hearing. Following argument of counsel, the trial court ruled that the EDR/SDM data would be allowed into evidence at trial, finding that it met the Frye criteria.

During the course of the trial, the "black box" evidence was introduced in support of the State's case against the petitioner. At trial petitioner presented an expert on the "black box" data, John Buchanan, who testified that the data is to be used as a supportive tool because the readings from the SDM can be effected, and in his opinion the readings from the SDM in the petitioner's case did not match the physical evidence. Buchanan testified that the SDM may have been malfunctioning or the petitioner's vehicle was modified which would cause the SDM not to be accurate. (T-897, 982, 984, 987, 1007, 1009, 1012-1013, 1015, 1018, 1024-1025, 1119, 1123, 1140, 1044, 1046, 1126, 1132, 1135) Following jury trial, the petitioner was convicted of two counts of vehicle manslaughter, and sentenced to 30 years as a habitual felony offender with a 15 year mandatory minimum as a prison releasee reoffender concurrent.

On March 30, 2005, the Fourth District Court of Appeal issued its opinion in Matos v. State, 30 FLW D859 (Fla. 4th DCA 2005). See appendix. The court, in affirming the petitioner's conviction, held in this case of first impression on this issue that the "black box" data met both prongs of Frye. First, that the evidence in questions was not new or novel scientific evidence, and second, that the evidence was generally accepted within the scientific community. On April 11, 2005, the petitioner filed a motion for rehearing and for certification of questions of great public importance. On May 5, 2005, the Fourth District Court of Appeal issued an order denying the petitioner's motion. Timely Notice to Invoke Discretionary Review was filed by the petitioner on May 17, 2005.

SUMMARY OF ARGUMENT

Petitioner has properly invoked the conflict jurisdiction of this Honorable Court. The opinion in Matos v. State, 30 FLW D839 (Fla. 4th DCA 2005), expressly and directly conflicts with the decisions of this Honorable Court in Ramirez v. State, 810 So.2d 836 (Fla. 2001), and Ramirez v. State, 651 So.2d 1164 (Fla. 1995). The "black box" data introduced by the State during

the

- 6 -

course of the trial was inadmissible for failing to meet the Frye criteria as applied by the court in the Ramirez cases.

ARGUMENT

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS HONORABLE COURT.

To properly invoke the conflict jurisdiction of this Honorable Court, Petitioner must demonstrate that here is express and direct conflict between the decision challenged herein, and those holdings of other Florida appellate courts or this Honorable Court on the same rule of law to produce a different result than other state appellate courts faced with the substantially same facts. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Article V, Section 3(b)(3), Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(iv). In The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), this Court explained that it had jurisdiction “over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. That is the opinion must

contain a

- 7 -

statement or citation effectively establishing a point of law upon which the decision rests.” Id. 288.

In holding the "black box" data admissible, the Fourth District Court of Appeal rendered an opinion which expressly and directly conflicts with this Honorable Court's opinions in Ramirez v. State, 810 So.2d 836 (Fla. 2001), and Ramirez v. State, 651 So.2d 1164 (Fla. 1995). The Ramirez cases stand for the proposition that among the issues to be decided by the court prior to the admission of new or novel scientific evidence, the trial judge must decide whether the expert's testimony is based upon scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs", and must determine whether theory in issue has been "sufficiently tested and accepted by the relevant scientific community." Ramirez, 651 So.2d at 1166-67; Ramirez, 810 So.2d at 844.

In the instant case, the lower court failed to follow the requirements of the Ramirez cases, in finding that the data was sufficiently established to have gained general acceptance in the relevant scientific community, and had been

sufficiently tested and accepted by the relevant scientific community. The State's first expert witness Felicella, testified that (a). that he could not testify

- 8 -

as to any quality controls or reliability when an EDR/SDM unit left the factory, (b). that one paper Felicella relied upon noted that there could be three ways that the internal workings of the SDM may cause the readings to be inaccurate; and most importantly, (c). **that the SDM was still evolving and undergoing changes.** (emphasis added) The State's other expert, Dr. McElroy, testified that **he could not say whether the SDM was designed to be introduced in a court proceeding, and that as far as being widely accepted, he could not say that a majority of accident reconstructionists were aware of the system to collect data from an SDM, and that there was tremendous room for improvement in the SDM.** (emphasis added)

In finding that the criteria for admissibility were met, the lower court's opinion conflicts with this court's holdings in the Ramirez cases. It was not proven that the "black box" data was generally accepted within the relevant scientific community, and contrary to the lower court's finding, such data

was novel in that it was still evolving and undergoing changes, and had tremendous room for improvement.

- 9 -

CONCLUSION

WHEREFORE, petitioner has validly invoked the conflict jurisdiction of this Honorable Court in the instant case. The petitioner respectfully requests that this Honorable Court grant his petition for review and reverse the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was Mailed this 13 day of June, 2005, to: the Attorney General's Office - Criminal Appeals Division, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401; Broward County State Attorney's Office, Criminal Appeals Division; Client.

By _____
Jack A. Fleischman

CERTIFICATE OF COMPLIANCE RE: FONT SIZE

COMES NOW, Jack A. Fleischman, attorney for the appellant, and certifies that he has used Times New Roman, 14 Point Font, for this brief.

By _____
Jack A. Fleischman