IN THE SUPREME COURT

STATE OF FLORIDA

THOMAS WAYNE HOUSER,

Petitioner,

vs. CASE NO: 66,074

STATE OF FLORIDA,

Respondent.
_____/

INITIAL BRIEF ON THE MERITS

ON BEHALF OF PETITIONER

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INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, THOMAS WAYNE HOUSER, was the Defendant in the trial court below and the Appellant in the District Court of Appeals. He will be referred to in this Brief as the Defendant. The Respondent was the State in the trial court and the Appellee in the District Court of Appeal. The Respondent will be referred to as the State in this Brief.

STATEMENT OF THE CASE AND FACTS

The District Court of Appeal affirmed the conviction and sentence of the Defendant on charges of DWI manslaughter and vehicular homicide. Pertinent facts were summarized by the District Court of Appeal in its Opinion as follows:

> "Appellant was the driver of a motor vehicle which struck a concrete wall, killing a passenger in the vehicle. Chemical analysis of appellant's blood indicated a blood alcohol level of 0.18%, and appellant was charged with both DWI manslaughter and vehicular homicide.
>
> Prior to trial, appellant sought to compel production of the blood sample for defense analysis, and the discovery was then made that the blood had not been continuously refrigerated after the initial analysis. Expert testimony established that a prolonged lack of refrigeration could diminish the blood alcohol content and thus impact the validity of any subsequent analysis. Appellant moved to suppress evidence relating to his blood alcohol content, asserting that the introduction of such evidence would violate his rights of confrontation and due process. The trial court denied the motion to suppress, and permitted evidence as to appellant's blood alcohol content."

The District Court of Appeal certified as issues of great public importance the following questions:

> "WHETHER EVIDENCE DERIVED FROM CHEMICAL ANALYSIS FOR BLOOD ALCOHOL CONTENT MAY BE ADMISSIBLE IF THE STATE DOES NOT PERSERVE A BLOOD SAMPLE SUSCEPTIBLE OF FURTHER ANALYSIS BY THE DEFENSE;
>
> WHETHER A DEFENDANT MAY BE SENTENCE FOR BOTH DWI MANSLAUGHTER AND VEHICULAR HOMICIDE FOR EFFECTING A SINGLE DEATH;
>
> WHETHER EVIDENCE OF BLOOD ALCOHOL CONTENT ESTABLISHED BY CHEMICAL ANALYSIS PRIOR TO THE ADOPTION OF HRS RULES RELATING THERETO MAY BE ALLOWED INTO EVIDENCE AT A TRIAL SUBSEQUENT TO THE ADOPTION OF SUCH RULES."

The Court also certified that its decision was in direct conflict

with Vela v. State, 9 FLW 1135 (Fla. 5th DCA 1984).

The Defendant timely filed his Notice to Invoke Discretionary Jurisdiction based upon the certification of the District Court of Appeal of issues of great public importance and of direct conflict with the decision of another District Court of Appeal.

ARGUMENT

ISSUE I

WHETHER EVIDENCE OF BLOOD ALCOHOL CONTENT ESTABLISHED BY CHEMICAL ANALYSIS PRIOR TO THE ADOPTION OF HRS RULES RELATING THERETO MAY BE ALLOWED INTO EVIDENCE AT A TRIAL SUBSEQUENT TO THE ADOPTION OF SUCH RULES.

This issue was addressed by the First District Court of Appeal in Drury v. Harding, 443 So.2d 360 (Fla. 1st DCA 1983), holding that these HRS rules are procedural in nature and may be applied to chemical tests administered prior to their adoption. The First District Court of Appeal noted that the Fifth District Court of Appeal had reached a similar result in State v. Fardelman, 9 FLW 1760 (Fla. 5th DCA August 9, 1984). Drury v. Harding, supra, is now pending before this Court on certified question, Case No: 64,724. A copy of the decision in Drury v. Harding is attached hereto in the Appendix to this Brief.

In the present case, the Defendant had sought to exclude from evidence at his trial, by Motion to Suppress and by a Motion in Limine, the results of a blood alcohol test administered on the Defendant on December 12, 1982. The essence of the Defendant's argument was and is as follows:

1) Section 316.1932(2)(a) Florida Statutes, as amended effective July 1, 1983, required the Department of Health and Rehabilitative Services to promulgate rules for the administration of blood alcohol tests,

2) The results of such tests performed after July 1, 1982 were admissible in evidence only if the tests were

administered in accordance with rules in effect at the time of the test, and

3) Since there were no rules adopted by HRS until December 16, 1983, the results of blood alcohol tests taken after July 1, 1982 but before December 16, 1982, including the Defendant's test results, are thus inadmissible.

The District Court of Appeal accepted the State's argument that the HRS rules, being procedural in nature, were in effect and properly applied to the Defendant at the time of the Defendant's trial.

In order to properly understand this issue, it is necessary to examine the history of legislation concerning the administration of blood alcohol tests.

Prior to 1967, there were no statutes on the subject. The Florida courts were guided solely by rules of evidence and constitutional consideration. Results of blood alcohol tests were admissible provided a proper predicate was laid showing (1) the test was reliable, (2) it was performed by a qualified operator with proper equipment, and (3) expert testimony was presented as to the meaning of the test results. State v. Bender, 382 So.2d 697, 699 (Fla. 1980).

In 1967, the Florida Legislature enacted laws pertaining to the use of chemical testing in "DUI" cases, i.e. Section 316.193, 322.261 and 322.262, Florida Statutes. These statutes as subsequently amended through 1977, were commonly referred to as the "DUI-Implied Consent Law", and provided in part that

results of blood alcohol tests could be introduced into evidence against one charged with DUI so long as the test was performed in strict compliance with rules and regulations adopted by the Department of Highway Safety and Motor Vehicles (Section 322.261 (2)(a), 327.01(11) F.S.) and by the Department of Health and Rehabilitative Services (Section 322.262, F.S.).

Specifically, D.H.S.M.V. was charged with "specify(ing) ... the test or tests which (are) approved by (this) department for reliability of result and facility of administration "and provide(ing) an approved method of administration". Section 322.261(2)(a) F.S. H.R.S., on the other hand, was delegated authority to: (1) approve the particular techniques or methods used, (2) qualify the individuals to conduct such an analysis, and (3) issue permits to such individuals with the authority to revoke. Section 322.262(3), Florida Statutes.

The two departments thus shared the responsibility and authority for implementation of blood alcohol tests. Both departments adopted rules after public hearings. Florida Administrative Code Chapters 15B-3 (D.H.S.M.V.) and 10D-42 (H.R.S.) The rules of both departments were important in the statutory scheme.[1]

---

[1]Rule 10D-42.21(H.R.S.) reads: "This regulation supplements and must be read in conjunction with CH 15B-3 Fla. Administrative Code, regulations of the Department of Highway Safety and Motor Vehicles" (emphasis added).

It is also clear that failure to strictly comply with these rules would render any test results inadmissible in evidence in a criminal trial. State v. Bender, supra,; Campbell v. State, 423 So.2d 488 (Fla. 1st DCA 1982).

The DUI law was substantially revised by the Florida legislature in 1982. One of the most significant changes was to eliminate the bifurcated administrative authority between H.R.S. and D.H.S.M.V. Effective July 1, 1982, H.R.S. was given total responsibility and authority over the administration of blood alcohol tests. Section 322.211, F.S. was renumbered as Section 316.1932, and amended to read:

> "(2)(a) The tests determining the weight of alcohol in the Defendant's blood shall be administered at the direction of the arresting officer substantially in accordance with rules and regulations which shall been adopted by the Department of Health and Rehabilitative Services. Such rules and regulations shall be adopted after public hearing, and shall specify precisely the test or tests which are approved by said Department of Health and Rehabilitative Services for reliability of result and facility of administration and shall provide an approved method of administration which shall be followed in all such tests given under this Section." (emphasis added)

The Defendant does not dispute the State's argument that the revisions in the DUI law were intended to "get tough" on drunk drivers. There are increased penalties, the admissibility into evidence of the refusal to take a chemical test, and call for "substantial" as opposed to "strict" compliance with testing rules. Section 316.193, 316.1932, 316.19321(f)(1), Florida Statutes. However, it is also clear that these objectives were to be obtained only after H.R.S. adopted the appropriate

rules, after public hearing, to implement the provisions of the statute.

This Court is bound to give effect to the clear words used in legislation. Holmes v. Blazer Financial Services, Inc., 369 So.2d 987 (Fla. 4th DCA 1979); Schulty v. State, 361 So.2d 416 (Fla. 1982). The plain meaning of the words used in the revised statute i.e. "rules ... which shall have been adopted..." and "shall be adopted after public hearing" clearly mandate future rule adoption.[2] It was necessary to have such rules adopted so that tests administered after July 1, 1982 could be done in "substantial" compliance therewith. Common sense and logic also compel this conclusion even without this wording since H.R.S. would have to adopt new rules in order to accept and replace the authority formally delegated to D.H.S.M.V.

Also, the adoption of emergency rules by H.R.S. December 16, 1982, is an admission of this requirement. In order to file emergency rules, the Administrative Procedure Act requires the agency to file a Statement of Emergency, Section 120.54(9)(a), Florida Statutes. H.R.S. did file such statement as follows:

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[2]Black's Law Dictionary (4th Ed.Rev. 1968) defines "shall" on page 1542:

"although the word usually denates an obligation, it also implies an element of futurity. (emphasis added).

> "Rule adoption is necessary to insure that alcohol detection machines and personnel are properly inspected and approved. This rule is also required to insure that drunken drivers are properly identified and where necessary prosecuted and removed from Florida Highways ...".
>
> Fla. Administrative Weekly, Vol. 8 #51, December 23, 1982 (emphasis added).

Certainly H.R.S. would not have filed these emergency rules if the purpose stated above could have been met by already existing rules. Likewise, had the Legislature intended a different result, such a provision could have been inserted in the revised statute. For example, the statute could have provided for substantial compliance with such rules as presently adopted by H.R.S. as may be amended from time to time.

The "gap" in the rules which necessarily occurs here is not a strained construction of the statute. Rather, it is the result of the failure of H.R.S., for whatever reason, to follow up on the legislative directive to adopt appropriate rules.

The H.R.S. rules are not rules of procedure. They are regulations concerning how a test is to be conducted on the date it is conducted. The District Court of Appeal in Drury stated that:

> "The rules were designed to permit the introduction of test results into evidence without the requirement of expert testimony to lay a predicate for the test's reliability. State v. Bender, supra. Because the purpose of the rules is to insure that only reliable evidence is placed before a jury, the law in effect at the time of the trial is the law that governs the admissibility of the evidence."
>
> (Drury Opinion, page 3).

However, the purpose of the rules is not only to insure the reliability of scientific evidence for future use in court proceedings, but also to "protect the health of those persons being tested." State v. Bender, supra. After all, if the State has, by law, required a driver to submit to a chemical test, appropriate precautions should be made to protect such a driver from any dangers incident thereto.

Just as important, however, the language of the statute requires that the test be administered in accordance with rules which "shall have been" adopted by H.R.S., indicating that the rule precedes the administration of the test.

Furthermore, it is clear that administrative rules cannot be retroactively applied. Sexton Cove Estates, Inc. v. State Pollution Control Board, 325 So.2d 468 (Fla. 1st DCA 1976); Gulfstream Park Racing Assn., Inc. v. Division of PariMutual Wagering, 407 So.2d 263 (Fla. 3rd DCA 1981); York v. State, 10 So.2d 813 (Fla. 1943).

As the court stated in York, supra:

> "Administrative regulations are binding on those affected by them only when promulgated in due course. They will not be permitted to be used in an ex post facto manner...".
> (10 So.2d at 815).

York involved the application of rules governing the admission of an applicant to the practice of denistry.

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York involved the application of rules governing the admission of an applicant to the practice of denistry.

In summary, the only reasonable interpretation and construction of the appropriate statute is that H.R.S. was to adopt rules which were to govern and direct the proper administration of all blood alcohol tests done after July 1, 1982. Failure of H.R.S. to follow this mandate and timely adopt rules has necessarily resulted in a hiatus during which blood tests taken were not in compliance with the statute and the results thereof are not admissible in criminal trials.

ISSUE II

WHETHER EVIDENCE DERIVED FROM CHEMICAL ANALYSIS FOR BLOOD ALCOHOL CONTENT MAY BE ADMISSIBLE IF THE STATE DOES NOT PRESERVE A BLOOD SAMPLE SUSCEPTIBLE OF FURTHER ANALYSIS BY THE DEFENSE.

The District Court of Appeal correctly pointed out that in cases involving the destruction of evidence, a balancing test has been applied by this Court to determine what sanctions, if any, should be applied against the State. The destruction of evidence can be intentional or unintentional. Demps v. State, 395 So.2d 501 (Fla. 1981); State v. Sobel, 363 So.2d 324 (Fla. 1978); Salvatore v. State, 366 So.2d 745 (Fla. 1978). In a similar vein, the District Court of Appeal stated that "the exculpatory value of the evidence must be viewed in the context of the entire record," the District Court of Appeal citing to California v. Trombetta, 52 U.S.L.W. 4744 (U.S. June 11, 1984); U.S. v. Agurs, 427 U.S. 97 (1976). This is in accord with this Court's rulings in Sobel and Salvatore, supra, that there must be some determination of the relative seriousness of the action by the State and the relative prejudice to the defendant resulting therefrom.

The District Court of Appeal concluded in this case that since it was the chemical analysis of the blood sample, rather than the sample itself, which was of primary importance to the Defendant and since the State's blood analysis expert was available for cross examination and the Defendant presented no evidence which would undermind the accuracy of the expert's

methods and procedures or otherwise make an independent analysis indispensible to a fair defense, the State's action in failing to properly preserve the blood sample was not so prejudicial as to warrant suppression of the evidence derived from the chemical analysis of the Defendant's blood sample.

It should be noted at this point that the State's own expert witness confirmed that failure to refrigerate the blood samples would destroy the reliability of tests performed later on the blood samples. (R 595-562). The failure to properly maintain the blood sample, then, was tantamount to a destruction of the evidence because its evidentiary value was zero since it was not refrigerated.

The Defendant would take issue with the District Court of Appeal's analysis and conclusion that suppression of the evidence was not warranted under these circumstances because the Defendant could not show substantial prejudice. This is based upon the observation by the Court that "the appellant presented no evidence which would undermind the accuracy of the expert's methods and procedures or otherwise make independent analysis indispensible to a fair defense." However, the defense attorney, in arguing the renewed or amended Motion to Suppress blood alcohol test results, represented to the Court that the defense expert had taken a blood alcohol reading which would have shown a level of .08. (R 164-165, 167).

Further, the Defendant's trial attorney anticipated that the State would object to the defense expert witness' testimony on the grounds that the blood had not been refrigerated and the

test results would be subject to claims of unreliability. In anticipation of this and of the Court's ruling in favor of the State, the Defendant offerred to withdraw the defense Motion to Suppress if the defense expert was allowed to testify. (R 170-171). The key point here, in terms of prejudice to the Defendant, is that the Defendant had no way of determining by an independent expert whether there were errors or irregularities or any other possible problems in the analysis made by the State's expert witness. There thus could be no basis upon which to compare and to look for possible irregularities or inaccuracies in the manner and method used by the State's expert. It was the State's actions in destroying the evidentiary value of the blood sample that created this problem and prejudice for the Defendant.

This was not a situation in which the chemical analysis was simply to determine the identity of the substance, e.g. cannabis or cocaine or some other controlled substance. In the present case, the analysis was to determine the exact level or percentage of alcohol in a particular blood sample. The sample could have been preserved, another blood sample could have been taken at the same time and preserved. The sample was not necessarily used up in the testing. Further, it was an extremely important item of evidence. The testimony of the percent of blood alcohol created a legal presumption of intoxication which the Defendant, under the circumstances, was effectively powerless to contradict. All of these factors show the very prejudicial nature of the State's action and should

have required the suppression of the test results.

ISSUE III

WHETHER A DEFENDANT MAY BE SENTENCED FOR BOTH DWI MANSLAUGHTER AND VEHICULAR HOMICIDE FOR EFFECTING A SINGLE DEATH.

The Opinion of the First District Court of Appeal on this issue is contrary to a long line of cases, not only decisions of the other District Courts of Appeal, but also previous decisions of the First District Court of Appeal, that have held that when there is but one death, there can be only one conviction for homicide. Stricklen v. State, 332 So.2d 119 (Fla. 1st DCA 1976); Vela v. State, 450 So.2d 305 (Fla. 5th DCA 1984); Muszynski v. State, 392 So.2d 63 (Fla. 5th DCA 1981); Brown v. State, 1984 FLW 1172 (Fla. 2nd DCA May 25, 1984); Platt v. State, 1984 FLW 847 (Fla. 2nd DCA April 11, 1984); Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981) Johnson v. State, 419 So.2d 1144 (Fla. 2nd DCA 1982); Ubelis v. State, 384 So.2d 1294 (Fla. 2nd DCA 1980); Thomas v. State, 380 So.2d 1299 (Fla. 4th DCA 1980); Brown v. State, 371 So.2d 161 (Fla. 2nd DCA 1979); Miller v. State, 339 So.2d 1129 (Fla. 2nd DCA 1976); Phillips v. State, 289 So.2d 769 (Fla. 2nd DCA 1974); Dawson v. State, 266 So.2d 116 (Fla. 1st DCA 1972).

The First District Court of Appeal concluded that DWI manslaughter and vehicular homicide were separate and distinct offenses and double jeopardy did not bar conviction and sentence on both. This is contrary to the holding in Vela v. State, supra. The Court in Vela noted that in cases where the

defendant is charged with DWI manslaughter and vehicular homicide, the court is concerned with a "degree crime", i.e. homicide, and that it was "logically impossible to commit more than one degree crime as to one death". 450 So.2d at 308.(Quoting from dissenting opinion of Cowart, J., in Baker v. State, 425 So.2d 36, 60 (Fla. 5th DCA 1982)).

Contrary to the First District Court of Appeal's conclusion, it should be obvious that both of the statutory sections involved here deal with and are concerned with preventing or punishing for one offense, i.e., homicide. If the language of Section 316.1931(2) (DWI manslaughter) is scrutinized, it is clear that what is intended is not a separate offense requiring separate punishment, but a means by which manslaughter can be proved additionally or alternatively. This Section reads:

> "(2)...if the death of a human being is caused by the operation of a motor vehicle by any person while so intoxicated, such person shall be deemed guilty of manslaughter and on conviction shall be punished as provided by existing law relating to manslaughter. (Emphasis added).

If the intent was to create a different offense and different punishment, rather than providing a means to establish and prove an already existing offense, the language in the statute would not need to refer to or talk in terms of being guilty of manslaughter. You could simply provide for the penalty.

The long standing rule that there should be only one conviction and one sentence for one homicide is a fair and sound one. The Defendant would urge this Court to reject the reasoning

of the First District Court of Appeal and confirm the reasoning and holding of the line of cases represented by Vella v. State, supra.

CONCLUSION

The blood alcohol test results should not have been admitted into evidence because they were improperly administered and without statutory authority, and, further, because the State destroyed the evidentiary value of the blood samples such that the Defendant was unable to present evidence to rebut or contradict the State's expert testimony.

The Defendant should not have been convicted and should not have been sentenced for both DWI manslaughter and vehicular homicide. The overwhelming case law, logic and fairness require that a Defendant be convicted and sentenced only once for one homicide.

For the above reasons, the Defendant prays this Court will quash the decision of the First District Court of Appeal and remand with directions to grant the Defendant a new trial or alternatively to correct the improper sentence.

Respectfully submitted,

TERRY P. LEWIS
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief on Merits on Behalf of Petitioner has been furnished to GARY L. PRINTY, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, and to MR. THOMAS WAYNE HOUSER, #089471, Post Office Box 1100 - Slot 50, Avon Park, Florida 33825, by United States Mail, this 15th day of November, 1984.

Jerry P. Lewis
ATTORNEY FOR APPELLANT

IN THE SUPREME COURT

STATE OF FLORIDA

THOMAS WAYNE HOUSER,

Petitioner,

vs. CASE NO: 66,074

STATE OF FLORIDA,

Respondent.
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APPENDIX TO

INITIAL BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

THOMAS WAYNE HOUSER,	*	NOT FINAL UNTIL TIME EXPIRES FOR FILING REHEARING MOTION AND
Appellant,	*	DISPOSITION THEREOF IF FILED.
vs.	*	CASE NO. AT-128
STATE OF FLORIDA,	*	
Appellee.	*	
	*	

Opinion filed September 26, 1984.

An Appeal from the Circuit Court for Duval County, A. C. Soud, Judge.

Terry P. Lewis, Special Assistant Public Defender, for appellant.

Jim Smith, Attorney General; Richard A. Patterson, Assistant Attorney General, for appellee.

WENTWORTH, J.

Appellant seeks review of judgments of conviction and sentences for the offenses of DWI manslaughter and vehicular homicide. We find that appellant has failed to present any point of reversible error, and we therefore affirm the judgments and sentences appealed.

Appellant was the driver of a motor vehicle which struck a concrete wall, killing a passenger in the vehicle. Chemical analysis of appellant's blood indicated a blood

alcohol level of 0.18%, and appellant was charged with both DWI manslaughter and vehicular homicide.

Prior to trial, appellant sought to compel production of the blood sample for defense analysis, and the discovery was then made that the blood had not been continuously refrigerated after the initial analysis. Expert testimony established that a prolonged lack of refrigeration could diminish the blood alcohol content and thus impact the validity of any subsequent analysis. Appellant moved to suppress evidence relating to his blood alcohol content, asserting that the introduction of such evidence would violate his rights of confrontation and due process. The trial court denied the motion to suppress, and permitted evidence as to appellant's blood alcohol content.

The state's failure to preserve a blood sample for defense analysis does not of itself necessitate suppression of the state's evidence;[1] rather, the egregiousness of the state conduct and the resulting prejudice to appellant must be considered. Demps v. State, 395 So.2d 501 (Fla. 1981); State v. Sobel, 363 So.2d 324 (Fla. 1978); Salvatore v. State, 366 So.2d 745 (Fla. 1978). And the exculpatory value of the evidence must be viewed in the context of the entire record. See California v. Trombetta, 52 USLW 4744 (U.S. June 11, 1984); U.S. v. Agurs, 427 U.S. 97 (1976).

With regard to substances identifiable only by chemical analysis, it is the analysis itself, rather than the physical substance, which is of primary importance to a defendant. See G.E.G. v. State, 389 So.2d 325 (Fla. 5th DCA 1980); cf., Trombetta, supra. In the present case the state's blood analysis expert was available for cross-examination, and appellant presented no evidence which would

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[1] See generally, State v. Plawchan, 9 FLW 1670 (Fla. 1st DCA July 31, 1984), applying California v. Trombetta, 52 USLW 4744 (U.S. June 11, 1984), with regard to the state's failure to obtain a preservable breath sample for defense analysis.

undermine the accuracy of the expert's methods and procedures or otherwise make independent analysis indispensable to a fair defense. We therefore find, in the context of the entire record, that the state's failure to preserve a blood sample susceptible of defense analysis did not result in such prejudice as would warrant suppression of evidence derived from the chemical analysis of appellant's blood.

Appellant also contends that he should not have been sentenced for both DWI manslaughter and vehicular homicide because only a single death occurred. However, DWI manslaughter, §316.1931(2), Florida Statutes, and vehicular homicide, §782.071, Florida Statutes, are separate and distinct offenses, each requiring proof of an element which the other does not;[2] the imposition of sentences for both offenses therefore does not violate protections against double jeopardy. See e.g., Scott v. State, 9 FLW 209 (Fla. 1984); State v. Baker, 9 FLW 209 (Fla. 1984); Borges v. State, 415 So.2d 1265 (Fla. 1982). The legislature has authorized multiple punishments for separate offenses occurring in one criminal episode, see §775.021(4), Florida Statutes, and we find no error in the imposition of multiple sentences in the present case. Contra, Vela v. State, 9 FLW 1135 (Fla. 5th DCA 1984).

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[2] But see Vela v. State, 9 FLW 1135 (Fla. 5th DCA 1984); compare Johnson v. State, 419 So.2d 1144 (Fla. 2d DCA 1982); Miller v. State, 339 So.2d 1129 (Fla. 2d DCA 1976); Stewart v. State, 184 So.2d 489 (Fla. 4th DCA 1966). While Vela suggests that §316.1931(2) and §782.071 merely provide differing methods of proving the single offense of homicide, upon examining the statutes we must disagree. Section 782.071 is a homicide statute which circumscribes the fatal operation of a motor vehicle "in a reckless manner likely to cause . . . death . . . or great bodily harm . . . ." Section 316.1931, however, merely establishes the applicable penalties for driving while intoxicated, and provides that:

> (2) . . . if the death of any human being is caused by the operation of a motor vehicle by any person while so intoxicated, such person shall be deemed guilty of manslaughter and on conviction shall be punished as provided by existing law relating to manslaughter.

This language, which immediately follows an enhancement of the penalty when less severe damage results, does not alter the primary focus of the statute--driving while intoxicated.

Appellant further contends that the state should have been precluded from introducing any evidence derived from chemical analysis for blood alcohol content since the Department of Health and Rehabilitative Services did not promulgate rules and regulations governing the administration of such chemical analysis until after appellant's blood was examined. This issue was addressed in Drury v. Harding, 443 So.2d 360 (Fla. 1st DCA 1983), pending on certified question, Supreme Court Case No. 64,724, holding that such rules are procedural and may be applied to chemical tests administered prior to their adoption. Accord, State v. Fardelman, 9 FLW 1760 (Fla. 5th DCA August 9, 1984).

We hereby certify that the decision in the present case is in direct conflict with Vela v. State, supra, we further certify the following questions as issues which are of great public importance and which have great effect on the proper administration of justice throughout the state:

> WHETHER EVIDENCE DERIVED FROM CHEMICAL ANALYSIS FOR BLOOD ALCOHOL CONTENT MAY BE ADMISSIBLE IF THE STATE DOES NOT PRESERVE A BLOOD SAMPLE SUSCEPTIBLE OF FURTHER ANALYSIS BY THE DEFENSE;
>
> WHETHER A DEFENDANT MAY BE SENTENCED FOR BOTH DWI MANSLAUGHTER AND VEHICULAR HOMICIDE FOR EFFECTING A SINGLE DEATH;
>
> WHETHER EVIDENCE OF BLOOD ALCOHOL CONTENT ESTABLISHED BY CHEMICAL ANALYSIS PRIOR TO THE ADOPTION OF HRS RULES RELATING THERETO MAY BE ALLOWED INTO EVIDENCE AT A TRIAL SUBSEQUENT TO THE ADOPTION OF SUCH RULES.

The judgments and sentences appealed are affirmed.

ERVIN, C.J., and BOOTH, J., CONCUR.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STEVEN DRURY, et al.,	:	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.
Petitioners,	:	
v.	:	CASE NO. AV-161
THE HONORABLE MAJOR B. HARDING, CIRCUIT COURT JUDGE, DIVISION B, FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY, FLORIDA,	:	
Respondent.	:	

Opinion filed December 29, 1983.

A Petition for Writ of Certiorari - original jurisdiction.

Louis O. Frost, Jr., Public Defender, John E. Mathews, III, Assistant Public Defender, Jacksonville, for Petitioners.

Jim Smith, Attorney General, Kathryn L. Sands, Assistant Attorney General, Jacksonville, for Respondent.

PER CURIAM.

The defendants in this prosecution for driving while under the influence of alcohol (DUI), Section 316.193, Florida Statutes (Supp. 1982), seek review, by certiorari, of a decision of the Circuit Court reversing the County

Court's order excluding chemical test results for blood alcohol content from introduction into evidence at trial.[1] We review and approve the Circuit Court's decision, and certify a question to the Supreme Court of Florida.

Effective July 1, 1982, the DUI law was revised and amended. One revision made by the legislature was to delegate the responsibility for adopting rules and regulations governing the administration of chemical tests to one administrative agency, Department of Health and Rehabilitative Services (HRS),[2] heretofore delegated to two agencies, HRS and Department of Highway Safety and Motor Vehicles (DHSMV)[3]. On December 16, 1982, HRS adopted emergency rules[4] containing those rules and regulations already adopted by HRS and those rules formerly under the purview of DHSMV prior to July 1, 1982. Between July 1, 1982, and December 16, 1982, the petitioners were arrested and charged with driving while under the influence of alcohol. At the time of their arrest, the petitioners submitted to chemical tests for blood alcohol content pursuant to Section 316.1932, Florida Statutes (Supp. 1982). The county court granted the motions to suppress the test results on grounds that

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1. The Circuit Court order sought to be reviewed was entered in the consolidated cases of State of Florida v. Steven Drury, Case No. 83-11-AP; State of Florida v. Milford D. Guthrie, Case No. 83-12-AP; State of Florida v. Danny Paul Johnson, Case No. 83-13-AP; State of Florida v. Sandra P. Lemunyon, Case No. 83-14-AP; State of Florida v. John D. Thompson, Case No. 83-15-AP; and State of Florida v. Ripley C. Davis, Case No. 83-16-AP.

2. Section 316.1932(1)(f)1., Florida Statutes (Supp. 1982).

3. HRS, Section 322.262(3), Florida Statutes (1981); DHSMV, Section 322.261(2)(a), Florida Statutes (1981).

4. On March 8, 1983, HRS adopted formal rules after a public hearing.

there were no rules lawfully in force, at the time the defendants were arrested, governing the testing procedures as required by Section 316.1932. The cases were consolidated for appeal in the Circuit Court. The Circuit Court reversed on the grounds that the subsequently enacted rules are procedural in nature and can be applied retrospectively. We issued a show cause order.

Upon consideration of the petition, the response, and petitioners' reply, we conclude that the Circuit Court ruled correctly. The rules and regulations adopted by HRS on December 16, 1982, are procedural and therefore they may be applied retrospectively to the petitioners in this case. Even without the rules governing the administration of chemical tests for blood alcohol content, the police had the authority to give the tests to the defendants. There is no consitutional impediment to a blood alcohol analysis with or without consent where probable cause has been established. State v. Bender, 382 So.2d 697 (Fla. 1980), citing Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.ED.2d 908 (1966), and Breithaupt v. Abram 352 U.S. 432, 77 S.Ct. 408, 1 L.ED.2d 448 (1957). The rules were designed to permit the introduction of test results into evidence without the requirement of expert testimony to lay a predicate for the test's reliability. State v. Bender, supra. Because the purpose of the rules is to ensure that only reliable evidence is placed before a jury, the law in effect at the time of the trial is the law that governs the admissibility of the evidence. This court finds the rules to be procedural in nature and we approve the decision of the Circuit Court, thereby allowing the test results to be introduced at trial, subject, of course, to a proper predicate for admissibility showing that the rules were complied with.

Pursuant to Rule 9.125, Florida Rules of Appellate Procedure, this court certifies the following question for resolution by the Supreme Court because the issue pending in this court has a great effect on the proper administration of justice throughout the state:

> WHETHER THE RULES ADOPTED DECEMBER 16, 1982, BY THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES GOVERNING THE ADMINISTRATION OF CHEMICAL TESTS FOR BLOOD ALCOHOL CONTENT UNDER SECTION 316.1932, FLORIDA STATUTES, CAN BE APPLIED TO TESTS ADMINISTERED BEFORE THEIR ADOPTION, THEREBY ALLOWING THE TEST RESULTS INTO EVIDENCE AT A TRIAL SUBSEQUENT TO THE RULES' ADOPTION.

In view of our finding of no departure from the essential requirements of law, the order to show cause is discharged.

BOOTH, SMITH, L., and SHIVERS, JJ., CONCUR.