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IN THE SUPREME COURT OF FLORIDA

DAVID JOSEPH MEHL,

Petitioner,

v.

CASE NO. 80,492
5DCA CASE NO. 91-186

STATE OF FLORIDA,

Respondent.

_____/

# RESPONDENT'S BRIEF ON THE MERITS

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## SUMMARY OF ARGUMENT

The procedures set forth in Rules 10D-42.028 -- 10D-42.030 of the Florida Administrative Code sufficiently comply with the requirements of Sections 316.1932 through 316.1934, Florida Statutes (1989) to ensure the reliability and accuracy of the blood test results obtained pursuant thereto to allow for the admission of said blood test results in evidence in a criminal trial.

## ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT REVERSING THE ORDER OF THE TRIAL COURT SUPPRESSING THE RESULTS OF THE TEST FOR THE ALCOHOL LEVEL IN PETITIONER'S BLOOD SHOULD BE APPROVED.

The Fifth District Court of Appeal set forth three distinct bases for reversing the order of the trial court suppressing the results of the test done on blood extracted from Petitioner to determine its blood alcohol content:

(1) HRS complied with the requirements of Section 316.1932(1)(f), Florida Statutes, by adopting the blood alcohol testing rules contained in Rules 10D-42.028 -- 10D-42.030 of the Florida Administrative Code;

(2) Regardless of compliance with Section 316.1932, the statutes that control the withdrawal of blood under the circumstances in this case are Sections 316.1933(2)(b) and 316.1934(3), Florida Statutes, which only require that the blood analysis be performed substantially in compliance with the methods approved by HRS, as was done in the instant case; and

(3) Even if the test results were inadmissible under Chapter 316, the State should have been afforded the opportunity to attempt to introduce the blood test results using traditional evidentiary techniques as suggested by this Court in Robertson v. State, 604 So.2d 783 (Fla. 1992) and Miller v. State, 597 So.2d 767 (Fla. 1991).

In concurring in the result only, Judge Diamantis found that a licensed operator, whose testing methods were approved by HRS

as part of the licensing procedure, performed the blood test on the defendant. He stated that there was absolutely no indication that the operator deviated from the approved testing method or that that method would not provide accurate results. He concluded that the results were admissible under Sections 316.1932(1)(f), 316.1933(2)(b) and 316.1934(2)-(3)(1989) and under Rules 10D-42.028 through 10D-42.030 of the Florida Administrative Code. He added that these test results would also be admissible if the State is able to satisfy the traditional predicates for admissibility as outlined in Robertson, supra.

Despite these multiple bases to support its holding, the District Court felt that this was an appropriate case to certify two related questions of great public importance to this Court, worded as follows:

> CAN THE STATE INTRODUCE INTO EVIDENCE PURSUANT TO SECTION 316.1934 BLOOD SAMPLE TESTS RESULTS EVEN THOUGH HRS HAS NOT ADOPTED RULES GOVERNING TESTING AND MAINTENANCE OF EQUIPMENT APPROVED FOR USE IN THE TESTING OF BLOOD SAMPLES?
>
> CAN THE STATE INTRODUCE INTO EVIDENCE PURSUANT TO SECTION 316.1934 BLOOD SAMPLE TEST RESULTS CONDUCTED IN ACCORDANCE WITH THE HRS RULES PROMULGATED AS 10D-42.028, ET SEQ.?

The answers to these questions do not affect the propriety of the District Court's reversal of the suppression order because the District Court had also reversed the trial court's suppression order based upon the trial court's failure to afford the State the opportunity to introduce the blood test results using

traditional evidentiary techniques. In his brief, Petitioner concedes that such test results would be admissible under Robertson and State v. Bender, 382 So.2d 697 (Fla. 1980), if the State can establish the traditional predicates for admissibility. However, he argues that, since this issue did not arise at the suppression hearing, the State should be foreclosed from exercising this option at trial. He cites no authority for that proposition.

Despite that concession, Petitioner argues that, under Section 316.1932(1)(f)1, HRS must have adopted rules and regulations after public hearing providing an approved method for performing tests on blood samples drawn for purposes of the implied consent statute. "Substantial compliance", he argues, is the standard for determining whether the tests were administered in accordance with that approved method, not whether or not the rules were properly adopted. He contends that Rules 10D-42.028-.030 do not properly detail the procedure to be used in analyzing the blood samples.

These arguments were addressed by the District Court in the majority opinion and in the concurrence. The FDLE forensic chemist who performed the tests in this case testified that there are only two quantitative procedures authorized for tests on blood for alcohol content: alcohol dehydrogenase and gas chromatography. To qualify for a permit under Rule 10D-42.030, the technician must submit to HRS a complete description of the procedure he uses and he must satisfactorily analyze "proficiency samples". Such tests can only be performed by the permittee in a

designated laboratory facility. Every three months, the permittee is given control samples to test to insure the accuracy of his testing equipment and methodology. Each permit must be renewed annually. Unsatisfactory results on two of four consecutive test samples mandate automatic termination of the permit. The District Court concluded that HRS has established a procedure which insures the reliability of the tests performed and that it has complied with the mandate of Section 316.1932(1)(f)1 by adopting Rules 10D-42.028-.030.

The Court also cited Section 316.1934(3) for the proposition that the chemical analysis of a person's blood must be performed substantially in accordance with methods approved (not "adopted") by HRS and by a person possessing a valid HRS permit. The Court found that the FDLE forensic chemist who conducted the blood tests in this case did so using the specific method approved by HRS and held a valid permit. It concluded that the HRS procedure has been formally adopted in rules and that accuracy is assured through the approval of specific techniques and frequent quality control checks. The Court said:

> The record is devoid of any evidence that the testing done on blood by FDLE in compliance with these HRS rules is prone to inaccuracy or, indeed, that the HRS-approved technique has ever produced any inaccurate test result.

In his concurrence, Judge Diamantis said:

> There is no indication that the operator deviated from the approved method or that the utilized method would not provide accurate results.

In State v. Burke, 599 S0.2d 1339 (Fla. 1st DCA 1992), review denied Fla. Sup. Ct. Case No. 80,169 (Fla. November 12, 1992), the First District was confronted with substantially the same issues involved in this case. That Court cited this Court's opinion in State v. Donaldson, 579 So.2d 728 (Fla. 1991) in concluding that minor deviations from the statutory guidelines which do not contravene the statutory purpose will not prohibit the introduction of such test results. That Court found that whether HRS provided the approved procedure for testing the weight of alcohol in a defendant's blood by administrative rule or whether HRS approves the procedure proposed by the individual technician in his permit application, the purpose of the statute, ensuring reliable scientific evidence, was achieved and that discrepancy should not preclude the admission of the results of those tests.

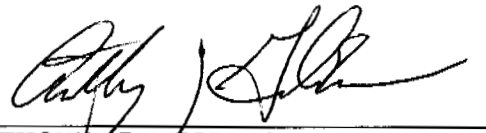
The State would submit that, assuming this Court decides to accept jurisdiction over this matter, the questions certified should be answered as follows: Rules 10D-42.028 et seq. of the Florida Administrative Code sufficiently comply with the mandate of Section 316.1932(1)(f)1, Florida Statutes (1989) to allow the results of blood tests administered pursuant to these rules to be admissible into evidence.

## CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays that if this Honorable Court accepts jurisdiction over this matter, it should answer the questions certified in the affirmative and approve the decision of the Fifth District Court of Appeal in the case subjudice.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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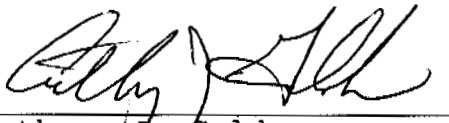
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been mailed to Flem K. Whited, III, Esquire, Lambert and Whited, Counsel for Petitioner, 630 North Wild Olive, Suite A, Daytona Beach, Florida 32118, this 9th day of December, 1992.



Anthony J. Golden
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

DAVID JOSEPH MEHL,

Petitioner,

v.

CASE NO. 80,492
5DCA CASE NO 91-186

STATE OF FLORIDA

Respondent.

_____/

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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presented in this case. The *St. Moritz* court found it "significant" that the application for review of the amended order was directed solely to alleged errors in the amended order. In a footnote, the court observed that no prejudice would accrue to an appellant from an amended judgment[2] if appellant had no quarrel with the amended judgment but was only concerned with alleged errors in the first judgment. *St. Moritz*, 249 So.2d at 29, n.1. The supreme court also noted that the *Betts* court, in denying the appeal in that case, relied in part on the fact that appellant had only raised trial errors leading to the first judgment. *Id.*

Reference to the decisions of other states is unsatisfactory because rules of civil and appellate procedure vary so widely among jurisdictions. *See, e.g., Wilson v. Leck's 66 Service Station*, 513 So.2d 620 (Ala. Civ. App. 1987); *Matuszewski v. Pancoast*, 526 N.E.2d 80 (Ohio App. 1987). Even so, other courts in analogous circumstances have also considered whether the party seeking review is adversely affected by the amended judgment as opposed to the original judgment. In some cases the question is framed in terms of whether the amendment is "material" in the sense that it adversely affects the rights of the appellant. *See Matter of Marriage of Mullinax*, 639 P.2d 628, 637 (Or. 1982). *See also E.C.I. Corp. v. G.G.C. Co.*, 237 N.W.2d 627, 629 (Minn. 1976) (the time to appeal an issue begins to run anew from a modification of a judgment when an issue sought to be raised on appeal was for some reason not appealable before the modification).

A purely mechanical application of the rule that entry of an amended judgment recommences the time for appeal does have the virtue of simplicity. Also, limiting appeal of amended judgments to certain issues only, and determining the appealability of an amended judgment by gauging which party is adversely affected by the amendment, can present substantial difficulties in many contexts that are easily imagined. We agree with our sister court of Oregon that "there are problems with either answer." *Lee v. Magnuson*, 660 P.2d 1095, 1097 n.2 (Or. Ct. App. 1983).

Nevertheless, Florida has a clear procedure for suspension of rendition of a judgment, and rule 1.540 proceedings are conspicuously absent. Fla. R. App. P. 9.020(g). It seems inimical to the desirable goal of finality of judgments and inconsistent with Florida's scheme of appeals to permit recommencement of the time to appeal any aspect of a judgment for a year or more by means of a rule 1.540(b) amendment.[3] Appeal of such an amended final judgment should be limited to the party adversely affected by the amendment and should involve only those issues affected by the amendment. Although such a limitation forecloses relief on an issue we believe has merit in the present case, it is not an unfairly prejudicial limitation to an appellant, like Tenant in this case, who had the opportunity to timely appeal the judgment that affected it adversely but elected not to do so.

AFFIRMED. (SHARP, W. and HARRIS, JJ., concur.)

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[1]Landlord urged it was obliged to sue for rent in county court; however, at the moment the Landlord filed suit in county court on October 3, 1990, the accrued rent claim already exceeded the county court's jurisdiction. As discussed *infra*, Tenant tendered the monthly rent for September, October and successive months; however, at the time suit was filed, all such tenders of rent had been refused. Landlord did not agree to accept the monthly rent until much later.

[2]Presumably the court refers to prejudice that would warrant recommencing the time for appeal.

[3]We acknowledge appellant's other argument that it is, in effect, appealing the amended final judgment to the extent the amended final judgment refused to set aside the balance of the original judgment. Part of the reason for assertion of this argument is unnecessary because we have considered the amended final judgment to be a new judgment notwithstanding the court's limiting language. Nevertheless, because we conclude all aspects of the original judgment not vacated were final thirty days after rendition, it makes no difference to the outcome. We reject appellant's argument that the court set aside the default judgment and allowed the setoff defense but then erred in refusing to allow assertion of additional defenses. This is not what the lower court did and it would not have been permissible had he done so.

* * *

**Criminal law—Evidence—Blood alcohol test results—Error to suppress test results on ground that Department of Health and Rehabilitative Services has failed to promulgate rules establishing standards for use, maintenance, testing, and upkeep of gas chromatograph—HRS rules in substantial compliance with statutory requirement—Different statutes are controlling in situations where blood alcohol test is administered pursuant to implied consent and situations where test is administered pursuant to law enforcement officer's probable cause to believe that person under influence of alcoholic beverages has caused death or serious bodily injury of another—Order of suppression subject to reversal because of trial court's failure to afford state opportunity to attempt to introduce blood test results using traditional evidentiary techniques—Questions certified: Can the state introduce into evidence pursuant to section 316.1934 blood sample test results even though HRS has not adopted rules governing testing and maintenance of equipment approved for use in the testing of blood samples?—Can the state introduce into evidence pursuant to section 316.1934 blood sample test results conducted in accordance with the HRS rules promulgated as 10D-42.028, et seq.?**

STATE OF FLORIDA, Appellant, v. DAVID MEHL, Appellee. 5th District. Case No. 91-186. Opinion filed August 21, 1992. Appeal from the Circuit Court for Seminole County, Robert B. McGregor, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and James N. Charles, Assistant Attorney General, Daytona Beach, for Appellant. Flem K. Whited, III, of Lambert & Whited, Daytona Beach, and Mark S. Troum of Troum & Wallsh, Winter Park, for Appellee.

(GRIFFIN, J.) The state appeals an order entered by the trial court granting the motion of defendant, David Mehl ("defendant"), to suppress the results of a test of the alcohol level in his blood.[1] We reverse.

After an automobile accident in which defendant and the occupants of a second vehicle suffered injuries, defendant was transported to Orlando Regional Medical Center for treatment. At the request of law enforcement officers, an emergency room physician drew a sample of defendant's blood, which was sent to Florida Department of Law Enforcement crime lab ("FDLE") for testing.[2] The test was conducted using a machine known as a gas chromatograph and revealed a blood alcohol level of .10.

Defendant was subsequently charged with three counts of driving under the influence and causing serious bodily injury,[3] one count of failure to appear,[4] one count of reckless driving,[5] and one count of leaving the scene of an accident.[6] Defendant filed a series of pretrial suppression motions, including a motion to suppress/motion *in limine* in which he sought suppression of his blood alcohol test results, arguing that section 316.1932(1)(f), Florida Statutes, applies to all blood testing conducted in Florida and that the Department of Health and Rehabilitative Services ("HRS") failed to comply with the requirements of this statute by not adopting rules for use, maintenance, calibration, testing, upkeep, or repair of the gas chromatograph. Defendant also contended the absence of specific and detailed testing methods in the rules adopted by HRS violated his constitutional rights of due process[7] and equal protection.[8]

At the hearing on the motion, the FDLE forensic toxicologist who conducted the test of defendant's blood testified about HRS rules governing the testing of blood for alcohol content. Only two quantitative procedures are authorized: alcohol dehydrogenase and gas chromatography.[9] Rule 10D-42.030, governs the issuance of permits by HRS to qualified technicians to conduct chemical analysis of blood using one of these two procedures. it requires the applicant for a permit to have certain professional qualifications and to submit to HRS a "complete description of procedures" used by the applicant in determining blood alcohol content.[10] To qualify for a permit utilizing this specific set of procedures the applicant must satisfactorily analyze and quantitate blood alcohol in "proficiency samples" provided by HRS. HRS approves this submitted procedure by issuing a permit to the technician. Rule 10D-42.030(3). ("The permit shall be issued

for a specific method performed by the permittee in the designated laboratory facility.") Thereafter, every three months,[11] HRS sends the permittee control samples, denominated "proficiency" samples, which he or she must test. Test results from this analysis must match the analysis of these "proficiency" samples done by recognized referee laboratories around the country. These permits must be renewed annually based upon written application and are conditioned upon "regular participation and demonstration of proficiency" by the permittee in analyzing blood samples submitted by the department.[12] The rules also mandate automatic termination of the permit upon unsatisfactory performance on two of four consecutive sets of proficiency samples or for "failure to maintain blood or breath alcohol testing equipment in proper working order." Rule 10D-42.032(4). This permit must be renewed annually. As these rules illustrate, HRS has established a procedure of blind testing of permittees to insure the reliability of the testing performed and has not promulgated separate procedures for maintenance, calibration, testing, upkeep, or repair of blood testing equipment.

The trial court granted defendant's motion to suppress the blood test results, ruling that, because HRS had failed to promulgate rules and regulations establishing standards for use, maintenance, testing, and upkeep of the gas chromatograph, there was no procedure that assured accuracy of blood tests done on such equipment as required by section 316.1932(1)(f)(1). The trial court similarly ruled that the lack of statewide standards governing the administration and analysis of blood samples as required by the same statute amounted to a violation of defendant's constitutional rights of due process and equal protection.

In *State v. Burke*, 599 So.2d 1339 (Fla. 1st DCA 1992), the First District Court of Appeal recently held that HRS has substantially complied with the mandate set forth by the legislature in section 316.1932(1)(f) by adopting the blood alcohol testing rules contained in rule 10D-42.028-.030 of the Florida Administrative Code; therefore, the results of blood tests administered pursuant to these rules are admissible evidence.[13]

We agree with the First District that the rules adopted by HRS for blood alcohol testing meet the requirements of section 316.1932(1)(f)1, Florida Statutes;[14] but we also question whether, in the present case, section 316.192(1)(f)1 is the statute that must be complied with. The legislature has enacted two statutes that authorize the withdrawal of blood for the purpose of determining the alcohol content of the blood. Section 316.1932 provides that "any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state" shall be deemed to have consented to an approved blood test for the purpose of determining the alcohol content of the blood if such person (1) appears for treatment at a hospital, clinic, or other medical facility as a result of his involvement as a driver in a motor vehicle accident, and (2) the administration of a breath or urine test is impractical or impossible. Section 316.1933 provides that if a law enforcement officer has probable cause to believe that a motor vehicle driven by, or in the actual physical control of, a person under the influence of alcoholic beverages has caused the death or serious bodily injury of a human being, such person shall submit, upon the request of a law enforcement officer, to a test of his blood for the purpose of determining the alcoholic content thereof. The latter statute applies to the present case.

Section 316.1933 does not have language paralleling the key language of paragraph (1)(f) of section 316.1932 relied on by defendant; instead, paragraph (2)(b) of section 316.1933 requires that the chemical analysis of the person's blood:

> must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the department for this purpose. The Department of Health and Rehabilitative Services may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analysis, and issue permits which will be subject to termination or revocation at the discretion of the department.

§ 316.193, Fla. Stat. (1989).

Sections 316.1932 and 316.1933 have similar, but clearly independent functions and the language of the two statutes is different. Section 316.1933 does not reference or incorporate the testing provision of section 316.1932(1)(f). The legislature has maintained this same dichotomy in the subsequent legislation concerning operation of a watercraft while intoxicated. The "driving privilege" statute incorporates 316.1932(1)(f), but the probable cause statute does not. The probable cause statute incorporates section 316.1933(2). *Compare* § 327.352(1)(d), Fla. Stat. (1989), *with* §§ 327.353(2), *and* 327.354(3), Fla. Stat. (1989). *See also* §§ 790.153-.157, Fla. Stat. (1991) (use of firearm while intoxicated). Perhaps the legislature perceived a substantive distinction between the procedure that should be followed in developing the rules for testing blood where the power to undertake this physical invasion was "implied" by statute as a condition of obtaining a driver's license and the procedure deemed appropriate where law enforcement has probable cause to believe the driver had caused death or serious injury through driving under the influence of alcohol.

Section 316.1934 provides:

> [T]he results of any test administered in accordance with s. 316.1932 *or* s. 316.1933 and this section shall be admissible into evidence when otherwise admissible . . . . (emphasis added).

We can find no basis to conclude that section 316.1932 controls availability of the section 316.1934 presumption in the case where a blood sample is taken pursuant to section 316.1933.

Because it appears that section 316.1932 does not control in this case, we must consider whether the procedure utilized by HRS complies with the terms of sections 316.1933(2)(b) and 316.1934. Sections 316.1933(2)(b) and 316.1934(3) require that a chemical analysis of a person's blood be performed substantially in accordance with methods *approved* [not "adopted"] by HRS and by a person possessing a valid permit issued by HRS for this purpose. This is exactly the procedure that was followed in these cases. HRS had approved the specific method proposed by the FDLE toxicologist in his application and had issued a permit to him to conduct blood analysis using that specific method.

Unlike the problem we encountered with breath analysis pursuant to section 316.1932 in *State v. Reisner*, 584 So.2d 141, *rev. denied*, 591 So.2d 184 (Fla. 1991), the HRS procedure for testing blood under section 316.1933 has been formally adopted in rules. The rule procedure is designed to assure accuracy through approval of specific testing techniques and frequent quality control checks. Although there are no equipment testing procedures specified in the body of the rule, such procedures may not be necessary. The testimony in this case establishes that this procedure adopted by HRS tests both the permittee and the equipment. The record is devoid of any evidence that the testing done on blood by FDLE in compliance with these HRS rules is prone to inaccuracy or, indeed, that the HRS-approved technique has *ever* produced *any* inaccurate test result.[15] Nor is there any evidentiary basis to conclude that a single, uniform test method is necessary or practical. The state met its burden at the hearing. Where HRS has promulgated rules required by 316.1933 and the state has followed the rules in conducting the test of defendants' blood, the presumption applies. The burden then shifts to defense to prove the regulations are substantially unsound to rebut the presumption. *Robertson v. State*, 17 F.L.W. 455, 456 (Fla. July 16, 1992).

We agree with the state's contention that the order of suppression should also be reversed because the trial court erred in not affording the state an opportunity to attempt to introduce the defendant's blood test results using traditional evidentiary techniques. This issue was resolved by the Florida Supreme Court in

*Robertson.* Such evidence would be admissible if the state could satisfy the traditional predicates for admissibility, including the qualifications of the persons taking the blood and conducting the [illegible], the reliability of the test, and the meaning of the test results. at 456. *See also, Miller v. State,* 597 So.2d 767 (Fla. 1991).

Because the question presented by this appeal is one of great public importance, we certify to the Florida Supreme Court the following questions:

CAN THE STATE INTRODUCE INTO EVIDENCE PURSUANT TO SECTION 316.1934 BLOOD SAMPLE TESTS RESULTS EVEN THOUGH HRS HAS NOT ADOPTED RULES GOVERNING TESTING AND MAINTENANCE OF EQUIPMENT APPROVED FOR USE IN THE TESTING OF BLOOD SAMPLES?

CAN THE STATE INTRODUCE INTO EVIDENCE PURSUANT TO SECTION 316.1934 BLOOD SAMPLE TEST RESULTS CONDUCTED IN ACCORDANCE WITH THE HRS RULES PROMULGATED AS 10D-42.028, *ET SEQ.*?

REVERSED and REMANDED. (COBB, J., concurs. DIAMANTIS, J., concurs in result only, with opinion.)

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[1]Review of this order is proper pursuant to the ruling in State v. Saufley, 574 So.2d 1207 (Fla. 5th DCA 1991).

[2]Whether the blood was drawn pursuant to section 316.1933, Florida Statutes (1989) has not been made an issue in this case. Defendant's first Motion to Suppress, in fact, challenges the sufficiency of the requesting officer's probable cause to believe there was serious bodily injury.

[3]§ 316.193, Fla. Stat. (1989).

[4]§ 843.15(1)(a), Fla. Stat. (1991).

[5]§ 316.192, Fla. Stat. (1989).

[6]§ 316.06(1), Fla. Stat. (1989).

[7]The "due process" claim is based on the lack of adequate standards as required by section 316.1932(1)(f)1.

[8]"Equal protection" is based on the difference in treatment of blood and breath tests.

[9]Fla. Admin. Code Rule 10D-42.028.

[10]The record does not disclose whether such procedures include any maintenance or testing of equipment.

[11]Rule 10D-42.030 does not specify the minimum frequency or timing of "proficiency" sample tests performed by permittees, but in light of the requirement of the rules that the proficiency testing be "regular," and in light of the evidence in this record that the proficiency testing is done at least every three months by HRS, there is no basis to conclude such a method of testing is inherently defective. Moreover, section 316.1934 expressly provides that insubstantial differences between approved techniques and actual testing procedures in any given case do not invalidate the test results for purposes of the presumption.

[12]Fla. Admin. Code Rule 10D-42.031.

[13]Section 316.1932(1)(f) provides:

> [T]he tests determining the weight of alcohol in the defendant's blood shall be administered at the request of a law enforcement officer substantially in accordance with rules and regulations which shall be adopted by the Department of Health and Rehabilitative Services. Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the 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.

[14]Defendant urges that section 316.1932(1)(f) requires HRS adopt rules that include the testing and maintenance of blood testing equipment similar to the requirements for breath testing equipment. *See* State v. Reisner, 584 So.2d 141, 144, 145 (Fla. 5th DCA), *rev. denied,* 591 So.2d 184 (Fla. 1991). *Reisner* was principally concerned, however, with the requirement that the rules governing the testing of breath equipment be properly promulgated as required by the statute, not so much with the question of what rules were necessary.

[15]The record does show that a standard deviation is inherent in all gas chromatography testing.

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(DIAMANTIS, J., concurring in result only.) I concur in the result of the majority opinion which reverses the trial court's order suppressing the results of appellee's blood alcohol test and [illegible] questions certified to the Florida Supreme Court.

However, I cannot subscribe to any suggestion that the legislature intended different requirements regarding the administration of blood tests under section 316.1932(1)(f) and sections 316.1933(2)(b) and 316.1934(3) of the Florida Statutes (1989), depending on whether the method of blood testing is required to be "adopted" or "approved". There is no rational basis to draw a distinction between blood tests in a section 316.1932 DUI case and a section 316.1933 case of driving a motor vehicle while under the influence causing death or serious bodily injury. If the language in sections 316.1933(2)(b) and 316.1934(3) of "approved methods" is to be construed to require less stringent criteria for assuring reliable blood test results, then we are faced with the question of whether such a distinction is reasonable because the effect of such a construction is to require greater reliability for the lesser offense encompassed by section 316.1932. In order to avoid such a construction and because the provisions of section 316.1933 augment the provisions of section 316.1932, I conclude that the provisions of these two sections as well as the applicable provisions of section 316.1934(2) and (3) were intended to be read *in pari materia.*

In the instant case, a licensed operator, whose testing methods were approved by HRS as part of the licensing procedure, performed the blood test on appellant. There is no indication that the operator deviated from the approved method or that the utilized method would not provide accurate results. Thus, appellee's blood test results are admissible under sections 316.1932(1)(f), 316.1933(2)(b) and 316.1934(2) and (3) of the Florida Statutes (1989) and rules 10D-42.028 through 10D-42.030 of the Florida Administrative Code. This evidence would also be admissible if the state is able to satisfy the traditional predicates for admissibility as stated in the majority opinion.

* * *

**Criminal law—Sentencing—Guidelines—Departure—Multiple violations of probation invalid reason for departure—Sentence may be successively bumped to one higher cell for each violation**

MICHAEL BARNHART, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 91-03125. Opinion filed August 19, 1992. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, Bartow, and Allyn Giambalvo, Assistant Public Defender, Clearwater, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Sue R. Henderson, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) After multiple violations of probation and community control, appellant was sentenced in excess of the guidelines for his conviction of delivery and possession of cocaine. The trial judge did not provide written reasons for departure but indicated at sentencing that it was for the previous violations of probation.

Even if the trial judge had listed the multiple violations of probation in a written departure order, that is not a valid reason to depart from the guidelines. *Williams v. State,* 594 So. 2d 273 (Fla. 1992). However, pursuant to that case it is permissible to "bump up" one cell for each violation of probation. We, therefore, reverse the sentence and remand for resentencing in compliance with *Williams.* Otherwise, affirmed. (PARKER, A.C.J., and ALTENBERND and BLUE, JJ., Concur.)

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**Civil procedure—Discovery—Physical examination—Record fails to support trial court's order prohibiting patient's counsel from being present at examination**

STEVE CONATSER, Petitioner, v. CLIFTON BROWN, an individual, and SHANE CAMPBELL, an individual, jointly and severally, Respondents. 2nd District. Case No. 92-02232. Opinion filed August 21, 1992. Petition for Writ of Certiorari to the Circuit Court for Polk County; J. Tim Strickland, Judge. John Hugh Shannon, Lakeland, for Petitioner. J. Michael Hunter, Lakeland, for Respondents.

(PER CURIAM.) Steve Conatser seeks certiorari review of a circuit court order which requires him to submit to a physical examination but prohibits his attorney from being present. As a general rule, absent any valid reason to exclude the patient's counsel or other representative, their presence should be allowed. *Stakely v. Allstate Insurance Co.,* 547 So. 2d 275 (Fla. 2d DCA 1989). The record in the present case does not support the trial court's decision to bar counsel from the examination.