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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,884

DCA NO. 93-660

JAMES BLORE,

Petitioner,

-vs-

THE HON. EUGENE J. FIERRO, CIRCUIT COURT JUDGE, and CIRCUIT COURT, APPELLATE DIVISION, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

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amended

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,884

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JAMES BLORE,

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Respondents.

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INTRODUCTION

Petitioner, James Blore, was the Defendant in the trial court, the Appellee before the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit, and the Petitioner before the Third District Court of Appeal. The Respondent Judge Eugene J. Fierro was the judge acting for the Appellate Division of the Circuit Court for the Eleventh Judicial Circuit in and for Dade County. The State of Florida was the prosecution in the trial court, the Appellant before the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit, and the Respondent before the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondents or by proper name where appropriate. References to the appendix to this brief are marked "A." References to the Record transmitted to this Court by the Clerk of the Third District Court of Appeal on July 30, 1993, are designated "R.".

INTRODUCTORY STATEMENT OF THE CASE

The State of Florida ("State") charged Petitioner James Blore with operating a vessel while under the influence of an alcoholic beverage (R. 13). Prior to trial, the trial court ruled that the State could not introduce the results of a breathalyzer test because they lacked scientific reliability (R. 54-57; 60). The State appealed to the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County (R. 62).

Petitioner moved to dismiss the State's appeal on the ground that there was no authority for a State appeal of this order (R. 63-66). Circuit Court Judge Eugene J. Fierro, acting for the Appellate Division, initially granted the motion to dismiss, finding that the appeal was unauthorized, and ruled that the matter would be treated as a Petition for Common Law Certiorari (R. 71-72). On rehearing, however, Judge Fierro, without stating any reason, reinstated the appeal (R. 87-88).

Petitioner sought a Writ of Prohibition from the Third District Court of Appeal ("Third District") (R. 1-12, 13-181). The Third District denied the petition but certified that its decision was in conflict with two decisions of the Second District Court of Appeal (*Blore v. Fierro*, 618 So. 2d 762 (Fla. 3d DCA 1993), set forth at A. 1-3). Petitioner then filed a notice to invoke the discretionary jurisdiction of this Court. Jurisdictional briefing was by-passed in accordance with Florida Rules of Appellate Procedure 9.030(a)(2)(A)(vi) and 9.120(d), and Petitioner now presents this Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

This cause began in the County Court of the Eleventh Judicial Circuit of Florida in and for Dade County when Petitioner James Blore was arrested by the Florida Marine Patrol on Miami Beach for operating a vessel while under the influence of an alcoholic beverage (R. 13-14). The arresting officer administered a breathalyzer test to Blore (R. 13).

Prior to trial, the county court ordered[1] that the State could introduce into evidence the results of the breathalyzer test because the breathalyzer had not been maintained in accordance with the regulations established by the Department of Health and Rehabilitative Services; thus, they were not scientifically reliable and could not come into evidence (R. 54-57; 60; A. 2).

The State filed a notice of appeal purporting to appeal this pre-trial evidentiary ruling to the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit (R. 62).

Petitioner moved to dismiss the State's appeal on the grounds that the appeal was not authorized by law (R. 63-65). Petitioner asserted that Florida Rule of Appellate Procedure 9.140(c)(1)(B), the exclusive source conferring on the State a right to appeal interlocutory rulings in criminal cases, limits State appeals to orders "suppressing . . . confessions or admissions," or suppressing "evidence obtained by search and seizure;" as to this latter category, the rule contemplates appeals where the evidence is suppressed on the grounds of unconstitutionality in the obtaining but does not permit the State to appeal a pre-trial evidentiary ruling excluding evidence on the grounds that it lacks scientific reliability (R. 63-64). Petitioner

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[1]The State orally moved for a pre-trial ruling that it was in compliance with HRS Service Rule 10D-42 and would be permitted to introduce the results (R. 18-20, 60). The Honorable Nancy Pollock, covering calendar for the assigned judge, the Honorable Marc Schumacher, ruled that the State was in substantial compliance despite its failure to have performed a maintenance check at the .05% concentration level (R. 40, 56, 60). Upon his return, Judge Schumacher, in open court with both sides present, announced that, because the State had previously made assurances at an *en masse* (as distinct from *en banc*) hearing before Judge Schumacher and several other judges that it would only try to introduce results that complied with all the applicable regulations, and because the failure to perform a maintenance check at the .05% level rendered the results in this case not scientifically reliable, the results could not come in at trial (R. 54-57; 60). Judge Schumacher specifically pointed out that this was in accordance with his rulings in all other similar cases in his division (R. 56).

noted that although the order was not appealable, this did not automatically preclude the State from seeking review of the order by certiorari (R. 65).

The State responded that Rule 9.140(c)(1)(b) is to be construed broadly, and under a broad construction, Judge Schumacher's order was appealable because the breathalyzer results were obtained through a search (R. 55-56). In the alternative, the State asked the court to treat the Initial Brief of Appellant as a Petition for Certiorari (R. 68).

Circuit Court Judge Eugene J. Fierro, acting for the Appellate Division, issued an order acknowledging that it lacked jurisdiction over the appeal, but ordering that it would treat the State's Brief as a Petition for Certiorari (R. 71-72).

In response to the State's motion for rehearing, which reiterated that a breathalyzer is a search and seizure (R. 75-77), the Appellate Division of the Circuit Court issued an order stating only that the State's motion for rehearing would be granted and the case would proceed as an appeal under Rule 9.140(c)(1); the court offered no reason for its change of position (R. 87-88).

Petitioner sought a Writ of Prohibition in the Third District Court of Appeal to prevent the Circuit Court Appellate Division from exercising jurisdiction over this unauthorized State appeal (R. 1-12).[2] The Third District denied the Petition, holding that "the state's appeal is authorized by Rule 9.140(c)(1)(B), because the petitioner's breath test results were obtained by 'search and seizure.'" (A. 2). The Third District then divined that its holding was in conflict with the holdings of the Second District Court of Appeal in *State v. Gemignani*, 545 So. 2d 929 (Fla. 2d DCA 1989), and *State v. Townsend*, 479 So. 2d 306 (Fla. 2d DCA 1985), which it characterized as standing for the proposition "a breath test was not 'evidence obtained by search and seizure.'" (A. 3). The Third District certified conflict. Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court.

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[2]Petitioner maintained his previous position that the issuance of the writ would not prevent the Appellate Division from reviewing the matter by way of certiorari (R. 6 n.5, 10).

QUESTION PRESENTED

WHETHER A PRE-TRIAL ORDER EXCLUDING BREATHALYZER RESULTS ON THE GROUNDS THAT THE RESULTS WERE NOT SCIENTIFICALLY RELIABLE BECAUSE THE BREATHALYZER WAS NOT MAINTAINED IN ACCORDANCE WITH THE APPLICABLE STATUTORY AND REGULATORY REQUIREMENTS, RATHER THAN ON THE GROUND OF UNCONSTITUTIONALITY IN THE OBTAINING, IS AN INTERLOCUTORY ORDER APPEALABLE BY THE STATE UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.140(c)(1)(B)?

SUMMARY OF ARGUMENT

Florida Rule of Appellate Procedure 9.140(c)(1)(B), the exclusive constitutionally-effective authorizing source of jurisdiction for interlocutory appeals by the State in criminal cases, does not authorize a State appeal from an order that excludes evidence for failure to meet an evidentiary predicate. This Court, several of the district courts of appeal, and Circuit Courts acting in their appellate capacities have held that the phrase "suppressing . . . evidence obtained by search and seizure" is not to be read so broadly as to permit an appeal of any pre-trial order that *excludes* evidence so long as the evidence came into the State's possession by a search and seizure; rather, this language requires that the order the State seeks to appeal must *suppress* the evidence on the ground of unconstitutionality in the obtaining. Because the order at issue in this case merely *excluded* the breath test results on the ground that the State failed to meet the applicable evidentiary predicate and not because of any unconstitutionality in the obtaining of the results, the State had no right to appeal the order. However, as Petitioner maintained throughout the proceedings below, this does not itself mean the State could not seek review by common law certiorari.

ARGUMENT

A PRE-TRIAL ORDER EXCLUDING BREATHALYZER RESULTS ON THE GROUNDS THAT THE RESULTS WERE NOT SCIENTIFICALLY RELIABLE BECAUSE THE BREATHALYZER WAS NOT MAINTAINED IN ACCORDANCE WITH THE APPLICABLE STATUTORY AND REGULATORY REQUIREMENTS, RATHER THAN ON THE GROUND OF UNCONSTITUTIONALITY IN THE OBTAINING, IS NOT AN INTERLOCUTORY ORDER APPEALABLE BY THE STATE UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.140(c)(1)(B).

The Third District Court of Appeal certified conflict in this case with two decisions of the Second District Court of Appeal, *State v. Gemignani*, 545 So. 2d 929 (Fla. 2d DCA 1989), and *State v. Townsend*, 479 So. 2d 306 (Fla. 2d DCA 1985). The Third District was quite correct that its decision was in conflict with these decisions (and with decisions of this Court and other lower courts), but as Petitioner will demonstrate, the ground upon which the Third District perceived conflict is, in fact, not the ground upon which conflict exists. Specifically, the Third District misapprehended the holdings of *Townsend* and *Gemignani*, finding them to stand for the proposition that a breathalyzer is not a "search and seizure;" in actuality, what *Townsend* and *Gemignani*, as well as decisions of this Court and other lower courts, have held is that a State appeal is authorized under Florida Rule of Appellate Procedure 9.140(c)(1)(B) only when the interlocutory order of which the State seeks review has suppressed evidence that was obtained by a search and seizure *on the specific ground that there was unconstitutionality in the obtaining*.

Under Florida law, the State has no generic right of appeal as to either final[3] or interlocutory orders;[4] rather, the right of appeal must be specifically authorized by law. *State v. C.C.*, 476 So. 2d 144 (Fla. 1985); *State v. Creighton*, 469 So. 2d 735 (Fla. 1985). As to

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[3]A final order is one that ends or concludes judicial labor in the cause. *See, e.g., Slatcoff v. Dezen*, 72 So. 2d 800 (Fla. 1954).

[4]An interlocutory order is one that may dispose of one or more issues in a given case but leaves some or all of the cause remaining for resolution. *See, e.g., Braddon v. Doran Jason Co.*, 453 So. 2d 66 (Fla. 3d DCA 1983).

final orders, it is within the exclusive province of the Legislature to provide for the right of appeal. *Creighton*, 469 So. 2d at 739-41.

As to interlocutory orders, however, review by appeal is available only where a party has the right to appeal an adverse final determination in the cause, *State v. C.C.*, 449 So. 2d 280, *adhered to on reh'g en banc*, 449 So. 2d 282 (Fla. 3d DCA 1983), *approved*, 476 So. 2d 144 (Fla. 1985), and this Court has established a rule that specifically provides for the right to interlocutory appeal. *R.J.B. v. State*, 408 So. 2d 1048 (Fla. 1982); *State v. Smith*, 260 So. 2d 489 (Fla. 1972); *State v. M.G.*, 550 So. 2d 1122 (Fla. 3d DCA), *rev. denied*, 551 So. 2d 462 (Fla. 1989).

As the State, the Circuit Court Appellate Division, and the Third District properly recognized in this case, Florida Rule of Appellate Procedure 9.140(c)(1)(B), is the exclusive authorizing source of appellate jurisdiction over State appeals from interlocutory evidentiary rulings.[5] Rule 9.140(c)(1) provides in pertinent part:

> (1) *Appeals Permitted.* The State may appeal an order
> * * *
> (B) suppressing before trial confessions, admissions, or **evidence obtained by search and seizure**[.]

Fla. R. App. P. 9.140(c)(1) (italics in original; emphasis in bold supplied).

This Court has held that the phrase "obtained by search and seizure" does *not* modify the terms "confessions" and "admissions." Thus, orders suppressing or excluding[6] confessions or admissions need not rest on the basis of unconstitutionality in the obtaining. *State v.*

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[5]No alternate basis for jurisdiction was asserted by the Respondent, by the Circuit Court Appellate Division, or by the Third District Court of Appeal, and indeed, none exists. *See* R. 130-32.

[6]It is not the labeling of the order which is determinative, but rather its nature. An order labeled as one of "exclusion," rather than "suppression," if it relates to confessions or admissions, is nevertheless appealable. *See, e.g., State v. Brea*, 530 So. 2d 924, 926 (Fla. 1988). Similarly, an order, whether labeled as one of "exclusion" or one of "suppression" of evidence, if based on grounds of unconstitutionality in the obtaining, is appealable. *See State v. Hancock*, 584 So. 2d 221 (Fla. 4th DCA 1991).

Palmore, 495 So. 2d 1170, 1171 (Fla. 1986). However, this Court also has held that the phrase "obtained by search and seizure" *does* modify the term "evidence," and an order that suppresses evidence must rest on the ground there was unconstitutionality in the obtaining in order for the State to have a right to *appeal* the order under the Rule. *McPhadder v. State*, 475 So. 2d 1215, 1216 (Fla. 1985)(where ruling excluding tape recording rested on the evidentiary grounds of hearsay and unavailability of the witness, there was no search and seizure issue, and interlocutory appeal was not authorized by Rule 9.140(c)(1)(B)). The district court in *McPhadder* had held expressly that:

> Although the question on appeal is not one involving a search and seizure issue, the evidence which was the subject of the order appealed was "obtained by search and seizure" and was suppressed before trial. Therefore . . . we find this question reviewable on direct appeal pursuant to rule 9.104(c)(1)(B).

State v. McPhadder, 452 So. 2d 1017, 1018 (Fla. 1st DCA 1984). This Court quashed the First District's decision, specifically stating, "We see no search and seizure issue." 475 So. 2d at 1216.

The Second District followed this holding in *State v. Townsend*, 479 So. 2d 306 (Fla. 2d DCA 1985), when presented with a certified question from a county court, which arose from an order granting a motion in limine to exclude the results of a blood alcohol test "on the ground that an excessive amount of time elapsed between the moment of the arrest and the drawing of the blood sample." *Id.* at 307. The court, recognizing that under Florida Rule of Appellate Procedure 9.030(b)(4)(B), it could not entertain jurisdiction of the certified question unless the order were otherwise appealable to the circuit court under Rule 9.140(c), concluded that it was without jurisdiction to review the question, and transferred the case to the appellate division of the circuit court for that court to address the matter by its *certiorari* jurisdiction. The court gave this reason:

> An order "otherwise appealable" by the State, and, hence, within Rule 9.140(c)(1)(B) must suppress "before trial confessions, admissions, or evidence obtained by search and seizure." The standard set forth in that rule is not met in this instance. In the

> face of section 316.1932, Florida Statutes, the taking of the appellee's blood and the subsequent result were neither "pretrial confessions" or "admissions" shielded by the Fifth Amendment . . . nor were they "evidence obtained by search and seizure" *requiring our intervention to preserve a Fourth Amendment right.*

Id. at 307 (emphasis added).

In *State v. Gemignani*, 545 So. 2d 929 (Fla. 2d DCA 1989), the Second District, on the authority of *Townsend*, held that the State had no right to appeal an order that suppressed a defendant's refusal to submit to a field sobriety test and videotape of his conduct and demeanor following his arrest.

Townsend and *Gemignani* were followed by the Appellate Division of the Circuit Court for the Thirteenth Judicial Circuit in *State v. Stevens*, 35 Fla. Supp. 2d 72, 73, 74 (Fla. 13th Cir. Ct. 1989)(following *Townsend* to refuse to treat as appeal review of order suppressing DUI videotape; not appealable "because there was no implication of those constitutional rights provided for in the Fourth and Fifth Amendments to the United States Constitution."); *State v. Zayas*, 35 Fla. Supp. 2d 95 (Fla. 13th Cir. Ct. 1989)(order suppressing breath results not reviewable by appeal).

Finally, in *State v. Hancock*, 584 So. 2d 221 (Fla. 4th DCA 1991), the Fourth District Court of Appeal specifically characterized as appealable under Rule 9.140(c)(1)(B) those "pretrial orders which suppress, *on constitutional grounds*, evidence obtained by law enforcement personnel from defendants." *Id.* at 222 (emphasis added).

Moreover, this construction of the rule is required in order to render a harmonious reading *in pari materia* of Rule 9.140(c)(1)(B) and Florida Rule of Criminal Procedure 3.190, which specifically designates as the grounds upon which evidence may be suppressed the unlawful search and seizure on the constitutional grounds that the warrant was defective, or that the warrantless search was illegal. *See Fla. R. Crim. P.* 3.190(h)(1)(A-D). Rule 3.190 further permits a defendant to move to suppress confessions or admissions "illegally obtained."

Clearly then, the Third District's analysis below, which was limited to the conclusion

that the results were the fruit of a search and seizure and the order was thus appealable, fell utterly short, missing the essential question: whether the breathalyzer results were suppressed or excluded on the ground of unconstitutionality in the obtaining. In fact, they were not; they were excluded on the ground that they were not scientifically reliable because the breathalyzer was not maintained in compliance with HRS regulations.[7] There being no constitutional ground for the exclusion, the order is not appealable under Rule 9.140(c)(1)(B), and the Third District erred in concluding that it is; its decision cannot stand.

As Petitioner has consistently maintained, of course, this does not mean the State would have no right of review by way of common-law certiorari. *See State v. Pettis*, 520 So. 2d 250 (Fla. 1988).

search

[7]The statutes that authorize breath tests for chemical analysis of alcohol content specifically authorize HRS to promulgate rules and regulations prescribing the procedure, and, further, specifically require that the actual test be conducted "substantially in accordance" with those HRS-approved methods. §§ 316.1932(1)(b), (f)(1); 316.1934(3), Fla. Stat. (1989). Results of such tests are "admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by its authority." *State v. Bender*, 382 So. 2d 697, 699 (Fla. 1980), *clarified, Robertson v. State*, 604 So. 2d 783 (Fla. 1992)(in the absence of some independent basis for testing, compliance with the policies of the statute is the critical factor). *See Gargone v. State*, 503 So. 2d 421, 423-24 (Fla. 3d DCA 1987)(under authority of *Bender*, reversing manslaughter convictions for non-compliance with HRS blood-alcohol testing requirements, and collecting cases).

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Court quash the decision of the Third District Court of Appeal and remand with instructions to direct the Circuit Court Appellate Division to dismiss the State's appeal.

Respectfully submitted,

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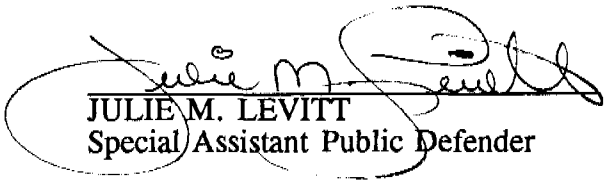
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Assistant Attorney General Marc E. Brandes, Department of Legal Affairs, 4000 Hollywood Boulevard, Suite 505S, Hollywood, Florida, 33021, this 27th day of August, 1993.



JULIE M. LEVITT
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IN THE SUPREME COURT OF FLORIDA

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-vs-

THE HON. EUGENE J. FIERRO, JUDGE, ETC., et al.,

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APPENDIX

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1993

JAMES BLORE, **

Petitioner, **

vs. ** CASE NO. 93-660

HON. EUGENE J. FIERRO, **
Circuit Court Judge, and
CIRCUIT COURT, APPELLATE **
DIVISION, ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA IN AND **
FOR DADE COUNTY,
**

Respondents, **

Opinion filed May 11, 1993.

A petition for writ of prohibition from Circuit Court for Dade County, Eugene J. Fierro, Judge.

Bennett H. Brummer, Public Defender, and Julie M. Levitt, Special Assistant Public Defender, for petitioner.

Robert A. Butterworth, Attorney General, and Marc Brandes, Assistant Attorney General, for respondent.

Before JORGENSON, GERSTEN, and GODERICH, JJ.

PER CURIAM.

Petitioner, James Blore, seeks a writ of prohibition restraining the Appellate Division of the Circuit Court from exercising jurisdiction over this appeal. We deny the writ of prohibition.

The underlying issue is whether the State has the right to appeal an order suppressing breath test results under Rule 9.140(c)(1)(B), of the Florida Rules of Appellate Procedure. Because this issue frequently arises in driving under the influence cases, it is necessary to explain our reasons for denying the writ.

Petitioner contends that the State's appeal of an order suppressing breath test results, because the breath testing device was not maintained in compliance with H.R.S. regulations, is not authorized by law under Rule 9.140(c)(1)(B). Respondent asserts that the state's appeal is authorized by Rule 9.140(c)(1)(B), because the petitioner's breath test results were obtained by "search and seizure." We agree with respondent.

Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure, provides:

> (1) Appeals permitted. The State may appeal an order
> ...
> (B) suppressing before trial confessions, admissions, or evidence obtained by search and seizure.

In Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), the Supreme Court noted that where government seeks to obtain physical evidence from a person, the Fourth Amendment may be relevant at several levels. "Obtaining and examining the evidence may also be a search, (citations omitted) if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable." Id., 489 U.S. at 616.

The Skinner court stated "[W]e have long recognized that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search." See Schmerber v. California, 384 U.S. 757, 767-768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The court then found this rationale was equally applicable to breath tests and stated:

> Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, see, e.g., California v. Trombetta, 467 U.S. 479, 481, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search.

Skinner, 489 U.S. at 616-617.

Based upon the above analysis, we disagree with the Second District's holdings in State v. Townsend, 479 So. 2d 306 (Fla. 2d DCA 1985), and State v. Gemignani, 545 So. 2d 929 (Fla. 2d DCA 1989), that a breath test was not "evidence obtained by search and seizure" and certify conflict. Because petitioner's suppressed breath test result was evidence obtained by a search, the Circuit Court, Appellate Division has jurisdiction to entertain a state appeal pursuant to Rule 9.140(c)(1)(B). Accordingly, the petition for writ of prohibition is denied.

Prohibition denied; conflict certified.