IN THE SUPREME COURT OF FLORIDA

RONALD J. UNRUH

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 85,046

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The State agrees with the Defendant's Statement of the Case. However, as to Defendant's Statement of the Facts, the State has several "areas of disagreement," as that term is used in Fla.R.App.P. 9.210(c). The State's primary disagreement is with the Defendant's presentation of the issue of the availability of a phone; this disagreement is discussed in more detail in the Argument section of this Answer Brief. More generally, the State believes that the Defendant's Statement of the Facts provides the facts in light most favorable to the Defense's legal position;[1] because Defendant was the appellant in the original appeal to circuit court and is now the petitioner before this Court, the facts should be provided in a manner most favorable to the State. Given these areas of disagreement, the State hereby presents its own version of the facts as presented in the hearing before the trial court:

On December 29, 1991, the Defendant was arrested by Trooper Raymond J. Steele of the Florida Highway Patrol and charged with

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[1]For example, the Defendant's brief claims that Defendant "requested three different times that he be afforded the opportunity to have an independent blood test conducted" (Page 2 of Defendant's Initial Brief -- Emphasis added) This implies that the Defendant merely wanted the opportunity to arrange a blood test. In fact, the Defendant's own testimony indicates that he wanted the police to arrange the test for him. (T9, 12) Note also that Trooper Steele did not concede that the request was made three times, only that "it may have been made" "more than once." (T7)

the offense of DUI. (T4-5)[2] The Defendant was then transported to the Ormond Beach Police Department. (T9) At the police department, Trooper Steele advised the Defendant of his Implied Consent warnings and requested that the Defendant submit to a breath test. (T5) The Defendant responded that he did not like the breath test and wanted a blood test instead. (T5) Trooper Steele then advised Defendant that "we didn't have that available right now"; and that he (Trooper Steele) "didn't have the facilities available to administer a blood test." (T5,6) Trooper Steele further told Defendant that his choice would be based on whether he would take a breath test or not; and that "if he wanted a blood test, he would have to take care of that after I [i.e., Trooper Steele] had finished processing him and completing the arrest."(T5) The Defendant himself admitted at the hearing that Trooper Steele advised him that he (the Defendant) could obtain the blood test on his own if he provided it for himself.(T11) Both Trooper Steele and the Defendant testified that the Trooper Steele never told the Defendant that he could not have a blood test. (T5,11)

After the conversation between the trooper and the Defendant, the Defendant did take the breath test.(T6) According to Trooper Steele, the Defendant made no other requests after taking the breath test. (T6) Specifically, the Defendant made no requests for "phone calls or any other action to obtain a blood test on his own." (T6) The Defendant himself conceded that "[t]he only thing

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[2]As used in this Answer Brief, "T" refers to the original transcript from the appeal to circuit court. A copy of this transcript is attached to this Answer Brief as Exhibit 1.

I told him was I wanted blood tests, and I figured he would arrange that himself." (T12)

After the breath test was administered at the police department, the Defendant was transported to the county jail.(T7-8) Because he did not have the time cards with him at the hearing, Trooper Steele refused to speculate as to how long the Defendant remained at the police department before being turned over to the county jail.(T7-8) The Defendant provided no testimony as to this matter either; however, he did testify that he remained at the county jail until 3pm the next afternoon.(T10)

On cross-examination of Trooper Steele, the following occurred:

> Q. Now, when you say the facilities are not available,[3] isn't it true that he was taken to the Ormond Beach Police Station when this breath test was administered?
> A. Yes, it was administered at the Ormond Beach Police Department.
> Q. And the Ormond Beach Police Department is the one that administered the test, correct?
> A. The breath test, yes.
> Q. Now, isn't it true the Ormond Beach Memorial Hospital is in Ormond Beach?
> A. That is correct.
> Q. Now, isn't it true they have the facilities there to administer a blood test?
> A. I would believe so.

(T7)

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[3]Note that Trooper Steele did not say on direct-examination that "the facilities are not available.." Rather, he said that he "didn't have the facilities available to administer a blood test." (T5-6)

SUMMARY OF ARGUMENT

The Defendant's legal argument before this Court relies in large part on his factual claim that a statement made in the Fifth District Court of Appeal's opinion below was incorrect. Specifically, the statement was that the Defendant "had a phone available to place calls." However, as the Argument section of the Answer Brief will show, the Record clearly supports such a statement, especially when considered in light most favorable to the State. Moreover, regardless of whether the Fifth District's statement was intended to mean that a phone was available at the police station or only at the jail, it makes no legal difference: Defendant never asked to use the phone at any time; in fact, the Defendant conceded that he simply asked for a blood test and "figured" that the police would arrange the blood test for him. Moreover, there is nothing in the Record to indicate how long of a delay there was from the time the Defendant requested a blood test until the time he arrived at the jail. Thus, the Defendant has failed to show that any passage of time due to being processed at the police station and transported to the jail haD any effect on his ability to obtain an independent blood test.

As to the legal issue, it is the State's position that Florida's independent blood test statute only creates a duty on law enforcement's part to not interfere with a DUI arrestee's attempts to obtain such an independent test; there is no duty on law enforcement's part to affirmatively assist the arrestee in obtaining the test. As an Annotation reviewing cases from around

the United States has explained, the "non-interference" interpretation has been accepted throughout the country, except in those states which have statutes that expressly impose a higher duty.

The Defendant claims that Florida's situation is unique and that the cases from out-of-state are inapplicable due to Florida's mandatory custody statute (which requires that DUI arresteeS remain in custody for up to eight hours). According to Defendant, the practical difficulties of getting someone to come to the police station or jail to perform a blood test necessitates an affirmative duty on law enforcement's part to assist in obtaining the test. However, many cases from out-of-state actually involve the situation where a person is in custody for an extended period time; these cases unanimously hold that merely allowing the arrestee access to a phone so that the arrestee can arrange to have a qualified person come to the place of custody to perform the blood test is sufficient both for due process and statutory purposes.

Moreover, without regard to the out-of-state cases, the only three Florida appellate cases which have considered this issue have also adopted the non-interference rationale rather than the affirmative duty rationale. Under the latest two cases (including the instant case), there is no duty on law enforcement's part to have a qualified person standing by so as to be able to administer a blood test upon demand, nor is there any duty to transport a DUI arrestee to a nearby hospital for this purpose. Instead, it is the arrestee's responsibility to find an appropriate person to perform

the test. Additionally, although this Court has not yet had an opportunity to address this specific issue, previous decisions of this Court reveal principles which are consistent with the non-interference rationale, rather than the affirmative duty to assist rationale.

Finally, there is a separate statute which sheds some light on the instant issue. This separate statute states that if the arresting officer does not request a breath test from the DUI arrestee, then that officer must, if requested by the arrestee, have a test performed. When this statute is read in pari materia with the independent blood test statute, it becomes obvious that the legislature intended to impose one type of obligation on law enforcement when the officer fails to request a breath test (i.e., the obligation to have some kind of test performed), and another type of obligation when the officer does request a breath test (i.e., the obligation to allow the arrestee to obtain a separate test on his own).

ARGUMENT: UNDER FLORIDA'S INDEPENDENT BLOOD TEST STATUTE, LAW ENFORCEMENT HAS NO AFFIRMATIVE DUTY TO ASSIST A PERSON IN OBTAINING THE TEST; RATHER, THAT DUTY IS LIMITED TO NOT INTERFERING WITH THE PERSON'S ATTEMPTS TO OBTAIN THE TEST

The certified question propounded to this Court by the Fifth District Court of Appeal is as follows:

> IS THE STATE REQUIRED TO TAKE AFFIRMATIVE ACTION TO ASSIST A PERSON IN CUSTODY FOR DUI TO OBTAIN AN INDEPENDENT TEST FOR BLOOD ALCOHOL WHEN IT IS REQUESTED PURSUANT TO SECTION 316.1932(1)(f)3, FLORIDA STATUTES?[4]

20 Fla. L. Weekly at D32. Perhaps the issue was better framed in the body of the Fifth District's opinion. That is, the Court articulated the issue earlier in its opinion as follows: "The issue is whether law enforcement has an affirmative duty to assist Unruh in obtaining an independent blood test or whether the duty is limited to not interfering with Unruh's attempts to obtain the blood test." Id., at 31. The Court went on to find that law enforcement does not have an affirmative duty to assist but instead only has the duty to "not prevent or hinder an individual's timely and reasonable attempt to obtain an independent examination. . ."

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[4]Defendant's initial Brief suggests that the certified question should include the preliminary question "Does Section 316.1932(1)(f)3 confer a discovery right?" As to this question, the Fifth District below aligned itself with the Second District's opinion in State v. Saylor, 625 So. 2d 907 (Fla. 2d DCA 1993) in holding that this section does not confer a discovery right; this holding effectively precludes any remedy for a violation of this section. The State herein is not actively pursuing the argument that there is no remedy for a violation of this section because it is not pertinent to the certified question; however, the State disagrees with Defendant's implication that such a ruling is unprecedented. In State v. Castillo, 528 So.2d 1221 (Fla. 1st DCA 1988) and Rice v. State, 525 So.2d 509 (Fla. 4th DCA 1988), both courts effectively held that there is no remedy when the police fail to provide a pre-arrest breath test when requested by a DUI arrestee, notwithstanding that a then-existing statute required a police officer to provide a pre-arrest breath test upon demand.

Id., at 32, note 5.

Before discussing the legal issue of what duty law enforcement should have in such a situation, the State would like to address a factual issue raised in Defendant's Initial Brief. In its opinion below, the Fifth District stated: "It is undisputed that he [i.e. the Defendant] had a phone available to place calls." Id., at 31. The Defendant claims this statement is incorrect. Additionally, after referring to two portions of the Record, Defendant makes the following claims:

> As can be seen from the foregoing, a phone was not made available at the Ormond Beach Police Department. Only after he had been transported, booked and processed into the Volusia County Jail was a phone made available, and then, only collect calls could be made. . . .

(Pages 14-15 of Defendant's Initial Brief)

There are numerous reasons why the State takes issue with these claims. The first, and perhaps most important, reason is that it is clear from the Record that the Defendant never asked to use a phone at any time. Trooper Steele testified to this fact on direct-examination. (T6) On cross-examination, the Defendant testified to this as follows:

> Q. Did you ask him for the use of a telephone or in some other way to contact somebody to get this blood test administered?
>
> A. When I got to the County Jail, that's when they gave me access to a phone, but he --
>
> Q. Did you make any requests to the trooper to allow you access to a telephone or some other means of communication to get this blood test you wanted arranged?
>
> A. The only thing I told him was I wanted blood tests, and I figured he would arrange that himself.

(T12) (Emphasis added)[5] Based on the above, it would not have mattered whether a phone was specifically offered to Defendant or not -- he clearly would not have attempted to use it to arrange for a blood test because he "figured that [Trooper Steele] would arrange that himself." See, Caplor v. Greenville, 422 F.2d 299 (5th Cir. 1970) (no violation of right to independent blood test where defendant made no request to use telephone).

Secondly, the mere fact that the Defendant testified that "[w]hen I got to the County Jail, that's when they gave me access to a phone" does not ipso facto mean that Defendant did not have access to a phone at the Ormond Beach Police Department. In the first place, the trial court, as finder of fact, was not obligated to accept this testimony;[6] in fact, one could infer from the Record that the trial court actually rejected this testimony and instead found that the Defendant actually did have access to a phone at the police station.[7] Moreover, Trooper Steele was never asked whether

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[5]It should be noted that the Defendant's reference to this testimony at page 14 of his brief leaves out the underscored portion of the above passage.

[6]See e.g., Morgan v. State, 303 So.2d 393,394 (Fla. 2d DCA 1974) ("Positive false testimony recognized as such and rejected by [the fact finder] is entitled to as much weight in support of a verdict as that of true testimony believed.")

[7]During the argument portion of the hearing, the following occurred:

> THE COURT: My understanding of the law in addition to the implied consent breath test, to make a blood test, it's up to him to get it. He can call his own doctor.
>
> MR. DAVIS [defense counsel]: How can he get his while he's under arrest, Judge?
>
> THE COURT: Use the telephone, call the doctor, get in

the Defendant was provided access to a phone at the police department. He only testified that he told the Defendant that "if he wanted to have a blood test, he would have to take care of that after I had finished processing him and completing the arrest." (R5) Trooper Steele did not say where this processing and arrest would be "finished" and "completed" -- it could have been while still at the police department. Thus Trooper Steele's testimony is susceptible of the inference that the Defendant had access to a phone at the station. In any event, because the Defendant was the appellant in his original appeal, and is the Petitioner in this certiorari petition before this Court, the benefit of the doubt as to this factual issue should go to the State. See Owen v. State, 560 So.2d 207 (Fla. 1990) (ruling of trial court on motion to suppress comes to appellate court clothed with presumption of correctness and appellate court must interpret evidence and reasonable inference and deductions in manner most favorable to sustaining trial court's ruling).

Finally, even assuming arguendo that no phone was ever specifically provided to the Defendant at the police department, this would not necessarily make the Fifth District's statement that a phone was available incorrect. It could be that the Fifth District was referring to the phone that, by the Defendant's own testimony, was made available at the jail. There is nothing in the Record to indicate how much time it took between the time that

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touch with your physican, have him come to the station. (T25) (Emphasis added)

Defendant requested a blood test and the time that he arrived at the jail.[8] And there certainly is nothing in the Record to support the claim in Defendant's brief that only collect calls could be made from the jail. Therefore, the Fifth District could have deemed any delay during this time to be insignificant, especially given the Defendant's apparent aversion to taking any action on his own to arrange a blood test. As the appellant below and Petitioner in this Court, the Defendant has clearly failed to show that any time passage due to being processed and transported to the jail had any impact on his ability to obtain an independent blood test.[9] Therefore, this Court should have no trouble accepting the Fifth District's statement that the Defendant "had a phone available to place calls."

With this factual matter now resolved, the State will hereby address the legal issue of what duty law enforcement has when a DUI suspect requests an independent blood test. The Fifth District below noted that the majority rule in this country, as articulated in an Annotation, is that there is no affirmative duty to assist, only a duty not to interfere. 20 Fla. L. Weekly at D32, note 5. Actually, it is more than a "majority" rule. As explained in the Annotation:

> The constitutional right to an independent sobriety test

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[8]Recall from the Statement of the Case and Facts that Trooper Steele refused to speculate as to this matter and that Defendant provided no testimony as to this matter either.

[9]For further discussion as to the effect of this passage of time on the legal issues in this case, see footnote 10 of this Answer Brief, at page 13.

> is really a right to police noninterference with the motorist's obtaining such a test. There is no constitutional right to police <u>assistance</u> in obtaining the test. . . .
>
> * * *
>
> Holding a motorist incommunicado, and denying telephone access, during the time when the motorist might arrange for a private sobriety test to establish his or her innocence, has been held a violation of the motorist's constitutional rights . . . , at least where the motorist has requested such telephone access . . . . The motorist's constitutional rights are observed when police officers allow the motorist to make a telephone call . . . or offer to make a call for a motorist who for good reason is denied personal access to a telephone . . . .
>
> Beyond allowing the telephone call, there are few constitutional demands on police officers in this situation. . . .
>
> * * *
>
> In some ways the statutory right to a private sobriety test parallels the constitutional right to such a test. The private test is not free, that is, a motorist with insufficient funds need not be afforded a private test at public expense. . . .
>
> Unless the statute expressly so provides, there is no right to police assistance in obtaining a private sobriety test, as distinguished from police noninterference with the motorist's attempts to arrange such a test. . . .

45 A.L.R. 4th 11, at §(2)(a), pages 17 and 18 (emphasis in original).

Twice in his brief, Defendant attempts to downplay the effect of the principles associated with this Annotation. Both times, he suggests that Florida's mandatory custody statute (section 316.193(9)) distinguishes Florida from other states. Specifically, Defendant first says:

> [M]ost all of our sister states have statutes similar to Florida's 316.1932(1)(f)3 (right to independent test);

> however, Petitioner is unaware of any sister state having a statute similar to Florida's 316.193(9), (mandatory holding statute). As a result of this, Florida's law pertaining to affirmative action to assist is unique and Florida case law should be used, if possible, to interpret our statutes.

(Page 10 of Defendant's Initial Brief) (Emphasis Added) Later in his brief, Defendant states:

> . . . [I]t is to be noted that this annotation was published in 1986, some 5 years prior to the enactment of F.S. 316.193(9) and did not consider the impact it would have on an accused's right to procure an independent test.

(Page 20 of Defendant's Initial Brief)

Notwithstanding Defendant's attempt to place Florida in a unique status due to the mandatory custody rule of section 316.193(9), this statute does not change the rule.[10] In fact, in many of the cases cited in the Annotation (as well as in cases not so cited), the person was in custody for an extended period of time; these cases unamimously hold that access to a phone (in order to arrange a blood draw at the place of custody) is sufficient.

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[10]It is ironic that Defendant here attributes such significance to the mandatory custody statute while at the same time making an issue of the fact that Defendant allegedly did not have access to a phone until he arrived at the jail. The delay associated with processing at the police station and being transported to the jail was about the same delay that Defendant would have experienced had he been allowed to bond out following processing at the police station. Thus, this Defendant was in appriximately the same position he would have been in had there been no mandatory detention statute -- whether in or out of custody, he still would have encountered difficulties finding a qualified person to conduct a blood test for him which was not medically necessary. See, e.g., State v. Bumgarner, 389 S.E. 2d 425 (N.C. App. 1990) (defendant who sought independent blood test and was given access to free telephone and telephone book contacted two hospitals; the first hospital refused to perform a blood test for defendant, the second hospital stated it would perform a blood test only under specified conditions which defendant could not meet).

See e.g., Short v. Commissioner of Public Safety, 422 N.W. 2d 40, 41-42 (Minn. App. 1988) (defendant was held in custody for the "usual" four hour detention period due to his breath test result being over .10; defendant was allowed to make two telephone calls, one to his wife after the breath test and one to his attorney within one hour after his arrival at the jail; court held that there was "no evidence that appellant was prevented or denied from arranging a test at the jail") State v. Snipes, 478 S.W. 2d 299 (Mo. 1972) (police satisfied due process requirements by allowing the motorist to make a telephone call, since the motorist could have called a physician and requested that he come to the jail and make an examination); Capler v. Greenville, 422 F.2d 299 (5th Cir. 1970) (court noted that state courts had held that police refusal of an accused's request to use a telephone to seek a test, or to call a doctor to conduct a test, is a denial of the due process requirement of a fair trial; however, it said that such cases were inapplicable, since the defendant made no request to use a telephone, and there was no police suppression of evidence); State v. Messner, 481 N.W. 2d 236, 240 (N.D. 1992) (record supported trial court's finding that defendant made no reasonable attempt to obtain an independent test and that police did not deny defendant a reasonable opportunity to obtain that test where defendant was promptly placed in jail cell with access to telephone that would have allowed him to arrange his own test and there was no evidence that defendant was unable to arrange an independent test; defendant for some unknown reason simply did not pursue the

matter).

Even ignoring the out-of-state cases and concentrating only on Florida law, as Defendant suggests, still yields the same results. Although this Court has not yet had the opportunity to directly interpret Florida's independent blood test statute,[11] there have now been three occasions when Florida's District Courts of Appeal have had that opportunity. The first occasion was State v. Durkee, 584 So.2d 1080 (Fla. 5th DCA) cause dismissed 592 So. 2d. 682 (Fla. 1991). In Durkee, police officers told the defendants in no uncertain terms that they would not be allowed to have a blood test. Under such circumstances, the Fifth District Court of Appeal ruled as follows:

> We hold now that the trial was correct in its reading of section 316.1932(1)(f)3 in the Durkee case. The Circuit Court was wrong in its conclusion that suppression of breathalyzer results is not an available sanction for the state's wrongful refusal of a defendant's request for an independent blood test. The last sentence of the statute, which alludes to a person's failure or inability to obtain an additional test, simply does not contemplate the situation where the test is prevented by state

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[11]The independent blood test statute, section 316.1932 (1)(f)3., Florida Statutes, provides:

> The person tested may, at his own expense, have a physician, registered nurse, duly licensed clinical laboratory technologist or clinical laboratory technician, or other person of his own choosing administer a test in addition to the test administered at the direction of the law enforcement officer for the purpose of determining the amount of alcohol in his blood or the presence of chemical substances or controlled substances at the time alleged, as shown by the chemical analysis of his blood or urine,or by chemical or physical test of his breath. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of the law enforcement officer.

> action. It refers to a person's inactivity or inability (e.g. facilities were not available, the defendant becomes ill or unconscious, a mistake at the testing facility invalidates the result, etc.), not to the conduct of the state. The state's refusal to allow such a test should not be equated with the statute's reference to a person's "inability" to obtain an additional test. That portion of the statute should not be read as encompassing active wrongdoing by the state, which is the situation in the instant case.

584 So.2d at 1082.(Emphasis added)

Durkee thus holds that the State may not commit "active wrongdoing" by "preventing" a Defendant from obtaining an independent blood test or by "refusing to allow such a test." (This holding is quite consistent with the principles set forth in the Annotation.) Of course, there was no such "active wrongdoing" in the instant case. As the trial court in the instant case found, "in the present case the trooper's actions did not actively prevent the Defendant from receiving an independent blood test." Utilizing the Durkee analysis, the Defendant's "inactivity" in the instant case, i.e., his failing to make any attempt to obtain a blood test (other than asking the police to do it for him), was the reason that there was no blood test here; not because of any "active wrongdoing" on the part of the police.

After Durkee, the Second District Court of Appeal had an opportunity to interpret the independent blood test statute in State v. Saylor, 625 So. 2d. 907 (Fla. 2d DCA 1993). Although the ruling in Saylor focused primarily on its conclusion that there is no discovery right to an independent blood test, the case is important for its statement that "We do not believe the legislature

intended to impose this burden on law enforcement[12] or to obligate the state to help an arrestee gather evidence for his defense." 625 So. 2d at 909.

The third time a Florida District Court of Appeal addressed this statute is State v. Unruh, 20 Fla.L.Weekly D30 (Fla. 5th DCA December 22, 1994), which is the instant decision now under review. In the instant case, the Fifth District has re-iterated the above principles, holding that law enforcement is not required "to transport an arrested person to a facility for a blood test, at that person's request." 20 Fla.L.Weekly at D31. As the Fifth District stated, "Certainly, the legislature did not intend for a law enforcement officer to be out of service for the time necessary to complete these tests for all persons arrested on the charge of DUI." Id.

Although the instant case presents the first opportunity for this Court to address law enforcement's duty under the independent blood test statute, this Court has previously decided cases which reveal principles consistent with the non-interference rationale of Durkee, Saylor and Unruh. In Hansbrough v. State, 509 So.2d 1081, 1084 (Fla. 1987), this Court stated:

> . . .While the state cannot withhold material evidence favorable to an accused, it is not the state's duty to actively assist the defense in investigating the case. State v. Coney, 294 So.2d 82 (Fla. 1973). The defense has the initial burden of trying to discover impeachment

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[12]The burden referred to was the obligation to have "on duty at the place of custody, twenty-four hours a day, a person medically qualified to take blood, breath, or urine samples with the equipment necessary to take such samples and to preserve them." 625 So.2d at 909.

> evidence, and the state is not required to prepare the defense's case. . .

The Defendant had suggested below that the above passage was inapplicable to the instant case because Florida's independent blood test statute "specifically allows an accused the opportunity to obtain exculpatory evidence (independent blood test)," whereas in Hansbrough, "there is no comparable statutory language allowing the accused to obtain exculpatory evidence." (Defendant's Response to State's Petition for Writ of Certiorari at 35) This argument is illogical. Surely, Defendant is not suggesting that no criminal defendant has a right to obtain exculpatory evidence unless there is a specific statute that applies to that particular defendant's case which allows such a right. In fact, as the court in Saylor points out, Florida's independent blood test statute "is simply meant to explain that which is always true -- any person may obtain his own chemical test for blood alcohol content if he wishes to do so." 625 So. 2d at 909.

The other relevant case from this Court is Houser v. State, 474 So.2d 1193 (Fla. 1985). In Houser, this Court held that "the state is not obligated to take affirmative steps to preserve a blood sample, drawn pursuant to section 316.1932, on the behalf of criminal defendants." 474 So.2d at 1195-1196. (emphasis added) The tone of this statement fits squarely within the "non-interference" rationale suggested by the State and is in sharp contrast to the "affirmative duty" rationale suggested by the Defendant. In fact, the opinion in Houser focuses on the "opportunity" of the defendant to question the results of the

state's test. See id, at 1195. In addition, the opinion's reference to section 316.1932(1)(f)3. (the independent blood test statute) is enlightening:

> We do not construe this section to require preservation of the sample taken at police request for analysis by defendant's expert. Section 316.1932 speaks of a "blood test" in a unitary manner, i.e. the drawing of the sample of blood and the analysis done thereon constitute the "test." The accused therefore has the right to have a sample taken and analysis made by an independent expert.

Id. (Emphasis added) It thus appears that this Court in Houser contemplated that both the taking of the sample (i.e., the independent blood test sample) and the analysis of the sample were to be the responsibility of the independent experts (i.e., experts designated by the accused), not by someone directed by law enforcement.

Finally, the State would refer this Court to section 316.1932(1)(d), Florida Statutes. This section provides:

> If the arresting officer does not request a chemical or physical breath test of the person arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages or controlled substances, such person may request the arresting officer to have a chemical or physical test made of the arrested person's breath or a test of the urine or blood for the purpose of determining the alcoholic content of the person's blood or breath or the presence of chemical substances or controlled substances; and, if so requested, the arresting officer shall have the test performed.

(Emphasis added) This section clearly states that if the arresting officer does not request a breath test from the DUI arrestee, then that officer must, if requested by the arrestee, have a test (of

his blood or breath or urine) performed. The obvious purpose of this statute is to insure that a DUI arrestee actually has some kind of scientific test performed (if he desires one) even though the arresting officer did not offer him one. On the other hand, the purpose of section 316.1932(1)(f)3. (the independent blood test statute) is merely to allow a defendant who is offered a test the "opportunity" (as stated in Houser, supra) to question the results of that test (i.e., by providing the defendant with the option to obtain his own test). If the legislature had intended that paragraph (1)(f)3. make it the police officer's responsibility to have the "independent" test made when the officer did offer the defendant a test, then the legislature would obviously have utilized the same mandatory language contained in paragraph (1)(d). When these two statutes are considered in pari materia, the only reasonable inference that can be drawn is that the legislature intended to impose one type of obligation on the police when the officer fails to request a breath test (i.e., the obligation to have some kind of test performed), and another type of obligation when the officer does request a breath test (i.e., the obligation to allow the arrestee to obtain a separate test on his own).

CONCLUSION

Based on the foregoing, this Court should answer the certified question in the negative and affirm the decision of the Fifth District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery/U.S. Mail to: French C. Davis, Esquire, 320 Magnolia Avenue, Daytona Beach, FL. 32114 this 3rd day of May, 1995.

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