IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL RANDY MILES,

Respondent.

CASE NO. 95,490

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

STEPHEN R. WHITE
FLORIDA BAR NO. 159089
ASSISTANT ATTORNEY GENERAL
CAPITAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4580

COUNSEL FOR PETITIONER

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 or larger.

STATEMENT OF THE CASE AND FACTS

The State brings this case to this Honorable Court through a question that the First District Court Appeal (DCA) certified:

> [B]ecause of the importance of this issue which is not entirely clear, we certify the following to the Florida Supreme Court as a question of great public importance:
>
> Where the state lays the three-pronged predicate for admissibility of blood-alcohol test results in accordance with the analysis set forth in *Robertson v. State*, 604 So. 2d 783 (Fla. 1992), thereby establishing the scientific reliability of the blood-alcohol test results, is the state entitled to the legislatively created presumptions of impairment?

State v. Miles, 24 Fla. L. Weekly D311 (Fla. 1st DCA Jan. 27, 1999) (copy attached as **Appendix A**).

The DCA opinion containing the certified question was the result of a timely State interlocutory appeal (II 314-15)[1] from a trial court's Order on Motion to Suppress or in the Alternative Motion in Limine to Exclude Blood Alcohol Test Results Because of the Inadequacy of the FDLE Regulations (II 311-13, (copy attached as **Appendix B**). The underlying Motion, which Respondent[2] filed in the circuit court, challenged rules of the Florida Department of Law Enforcement (FDLE) pertaining to blood testing. (See I 5-9. See also I 71: "... because of the inadequacy of the FDLE regulations" I 113: "whether the rules are adequate"; I 73; 116; 123)

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[1] The record on appeal consists of two volumes, which will be referenced according to the respective number labeled on each's front cover (i.e., "I" or "II"), followed by any appropriate page number. The pagination stamped at the bottom of pages, apparently by the circuit clerk, will be used.

[2] Respondent was charged with DUI Manslaughter (James Mulloy), Vehicular Homicide (James Mulloy), DUI Causing Personal Injury (Ralph Keith Nelson), and DUI Causing Property Damage (Ralph Keith Nelson) (I 1-2).

In his Motion, Respondent sought exclusion of the blood alcohol results of 0.104 and 0.103 grams per 100 milliliters (I 7. See also I 4) and "any testimony relating thereto" (I 8).

At the hearing on the Motion, the State's position[3] was that the rules were adequate (I 122-23):

> ... the rules do specify methods and procedures adequately. And in terms of the collection and storage, that's an evidentiary matter, Judge, that as Mr. Wood [an FDLE expert on the implied consent program] testified you've got to use common sense and standard practices. Rules can never spell out every possible accident or misfortune that may befall a piece of evidence, and that would go to the weight of the evidence as opposed to admissibility.
>
> *** The statute itself, 316.1933, states that ... any substantial differences between approved methods or techniques and actual testing procedure or any ... insubstantial defects concerning the ... issue shall not render the test results invalid.

The prosecutor alternatively argued that under the "Robertson" case the State could seek admission of the blood alcohol test results. (I 123) He elicited some details from an FDLE analyst concerning the condition of blood in specific past cases, including this case, and argued that this evidence was relevant. (See I 115-19)

In support of its position, the State called two witnesses: Thomas Maxwell Wood (I 76-110) and Laura Barfield (I 110-20).

Wood, a chemist by education with FDLE experience dating from 1976, works for FDLE "in the alcohol testing program." His duties include administering "the blood alcohol testing program and permitting program." He testifies "on behalf of the alcohol testing

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[3] The sufficiency of the Motion was not addressed below (See I 71-76); therefore, the State has not addressed it on appeal.

program for interpreting the rules," and he has "participated in creating and modifying the rules." (I 77-78)

Wood detailed several FDLE rules concerning blood alcohol testing (See I 79-98, 100-103), for example, permitting (I 79-80, 87-88, 90-91), proficiency testing (I 84, 93-94), the approved methods of blood alcohol testing (I 88), and the collection and preservation of the sample (I 91-93). Wood explained that the rules require that a blood sample "must be in a stoppered ... tube to prevent evaporation and the tube must contain an anticoagulant substance." (I 109. Also, see I 92)

Wood outlined the history of the rules (I 85), and he testified as to their purpose (I 87):

> They have several purposes. First, we want to provide accurate and reliable results ... . In so doing we also need to keep in mind what we call facility of administration, and so we try to find a balance where we can find a way to provide accurate and reliable results, articulate the law, in other words, and yet not create a monster in doing so.

Wood later elaborated on what he meant by not creating a "monster" (I 89):

> [W]e ... really don't need to put something in the rule unless it is necessary. We want to keep them short, and so there is no need to articulate ... the obvious. For example, you ... would want to avoid exposing the blood to extreme temperatures, correct and so -- but that is ... universally known. We don't need to say that.

In regards to these "universally known" techniques, Wood acknowledged that FDLE relied upon "normal law enforcement techniques" and "common knowledge" (I 90) of the "obvious" (I 105).

Wood testified that when the blood deteriorates due to heat, the results are probably "lower" (I 99-100). He compared leaving the blood sample in a trunk "in a blazing August sun" for a matter of

seconds with leaving it there for a week, indicating that the former would not affect the result whereas the latter would "do harm" (I 99).

Wood testified that the FDLE rules do not require a preservative (I 102), which would "enable[] your sample to withstand and provide good results with more extreme handling" (I 103).

Wood testified concerning the blood testing vials and preservatives (I 104):

> [I]t is universal that the tubes that the blood alcohol samples are collected in ... contain an anticoagulant and a preservative. They have a standard color. You ask any officer anywhere in the nation about a blood alcohol kit, and they will know it is a gray stopper tube.
> ***
> [T]here's no procedure [in the rules] for determining the type of preservative, the amount of preservative or any standard whatsoever for this preservative ... .

Concerning transporting and storing a blood sample, he acknowledged that there is no refrigeration requirement in the rules. (I 105) He continued (I 105):

> And again there's no need for us to articulate the obvious in this matter. If ... somehow ... it ... turned out that it was common to overheat the samples or was common to delay sample delivery for months, then there would be a rule on it, but that, in fact, doesn't happen.

Wood concluded without objection that the rules pertaining to collecting and labeling blood are "[m]ore than adequate." (I 89)

Wood testified that the blood was drawn in this case on December 19, 1996. (I 81)

Laura Barfield, the State's other witness, testified that the blood sample in this case was analyzed on January 4, 1997 (I 114). Barfield was the FDLE "crime laboratory analyst" (I 111) who analyzed the blood in this case (I 114).

Barfield testified regarding the signs of the vial being "air-tight sealed" (I 115-16). She testified concerning the integrity of the sample in this case (I 117):

> In this case the blood when examined by tipping the vial back and forth flowed freely. There was no clots. There was nothing to indicate that it was deteriorated. I did not have to grind it with a tissue grinder in order to analyze it. Therefore, I would say it was not deteriorated.

She elaborated on her conclusion that the sample here had not deteriorated. (See I 117-18)

Concerning the effects of heat on a sample, she testified (I 118):

> [T]hey actually studied the effect of throwing a blood kit with blood in it [and containing a preservative and anticoagulant, I 119] in the back of someone's trunk for six days, took it out of the trunk and analyzed it. They had analyzed it previously to throwing it into the trunk, and the result of it being in the heat, which the temperatures they said reached about 100 degrees outside, was a loss of alcohol.

She also indicated that the chances of the blood alcohol result from a living person being higher due to microorganisms are "slim" because it would require not only the presence of the bacteria in the blood but also glucose (I 119).

At a subsequent continuation of the motion hearing (II 243), the defense called as a witness Thomas Roger Burr. (II 246-90) Burr, educated in chemistry and biology, is a "forensic scientist," with his "office and practice ... in Minneapolis, Minnesota." (II 247) Burr had reviewed pertinent FDLE rules (II 250-52). He had not reviewed Florida statutes on the subject. (See II 270) He might have read pertinent Florida statutes "once upon a time" (II 272). He had

previously testified that "the previous rules under HRS" were "deficient" (II 289-90).

Burr testified that Fla. Admin. Code R. 11D-8.012

> is not complete and does not provide for those items that are necessary to ensure the accuracy and reliability in collection and transportation of those samples. And specifically, the regulations do not require the presence of a preservative at all[, and] *** there are no provisions for any amount of anticoagulant.

(II 253) He defined an anticoagulant as a "substance that keeps the blood from clotting." (II 254) A "chemical such as potassium oxalate ... [is] the most common one used in forensic blood kits." (II 253) He described a preservative as a substance that "prevents chemical oxidation from destroying the blood alcohol concentration" and that "prevents and microorganisms that are in the sample, bacteria, yeast, from either destroying alcohol by eating it up as food or by creating alcohol by turning sugars in the blood into alcohol." (II 255. See also II 276: "without a preservative, you're going to see a statistically significant drop in the alcohol content") He later specified a type of yeast in "vaginal yeast infection" that is "very common on human beings" (II 277).

Burr testified that guidelines "should" include "refrigerat[ion] as much as possible." Otherwise, the risk of "changing the alcohol concentration" is "increase[d]" (II 256-57). He discussed various scenarios of transportation and storage. (II 257) He distinguished storing the sample "at room temperature" from "cool temperatures" (II 257). He said that the police need guidelines on these subjects because they are "not scientists" (II 258. See also II 273). Burr testified (II 279):

> There's some studies that show that there's no significant deterioration [in an unrefrigerated blood sample in one or two weeks]. Particularly if there's a good preservative in it, it can stay at room temperature for quite a while if it's not affected.

Burr testified that he was challenging the rules "on their face," and continued: "I'm not saying what is or isn't done in any particular case." (II 284) He said that in "[m]ost of the cases" he had worked on in Florida, "there were anticoagulants and preservatives in the sample" (II 282).

Burr testified (II 279):

> Q [W]e can't ... account [in the rules] for every thing that might happen, that it's against common sense and just good law enforcement, right?
> A Oh, obviously you can't write a rule that's going to -- there's always going to be a problem no matter what kind of rule you write. But, you know, that doesn't mean you don't write a rule.

The FDLE rules were introduced (attached as **Appendix C**).[4]

After the hearing, the trial court rendered a written order (II 311-13, Appendix B). The trial court's order cited to "due process" as the "sole issue" (II 311), relied upon the "'core policies' announced in *State v. Bender*" (II 312), and concluded that Section 316.1933(2)(b), Fla. Stat., and FDLE Rules fail to cover "circumstances of maintaining the sample in a condition that would ensure a reliable analysis indicating the blood alcohol content of

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[4] Appendix C contains the FDLE Rules at the time that Respondent's blood was drawn December 19, 1996, (Compare I 112, 131-33 with I 81) and at the time that it was analyzed January 4, 1997, (Compare I 307-307 with I 114). The rules were admitted into evidence, or stipulated to, below at I 82, 110 and I 112-13, 121. (See also II 296: "you have the rules in front of you") Differences between the 1996 and 1997 versions of the rules were explained in the motion hearing to the trial court. (See I 79-85, 105-107, II 251-52)

the sample" (II 312). Because of this deficiency, the trial court denied the State the benefit of any "presumption pursuant to Section 316.1934," Fla. Stat. It based its decision solely upon "the adequacy of the rule relating to 'preservation' of blood samples drawn pursuant to the aforesaid statute [§316.1933, Fla. Stat.]." (II 311) The trial court allowed the "opportunity" to establish a predicate for admissibility of the test result "pursuant to the authority of *Robertson v. State*, 604 So.2d 783 (Fla. 1992)" (II 313).

Affirming the trial court's order that excluded the "presumption," the majority of the DCA panel noted the issue:

> The only question raised by appellee's motion to suppress or alternative motion to exclude blood-alcohol test results was whether the rule relating to preservation of blood samples drawn pursuant to section 316.1933, Florida Statutes (1995), adequately protects the due process rights of those persons charged with driving under the influence of alcohol.

The majority also certified the question quoted supra and noted:

> In the event the state lays the three-pronged predicate described in *Bender*, and successfully withstands any and all defense rebuttal, the evidence is deemed scientifically reliable, hence admissible. After admissibility has been determined in accordance with the common law principles, it seems, and we hold, that the legislatively created presumptions with respect to impairment are applicable to the blood-alcohol test results which have been determined to be admissible into evidence.

Judge Wolf "dissent[ed] from that portion of the majority opinion affirming the trial court's decision." He would have certified a question regarding the adequacy of exiting preservation rules. He reasoned, in part, that "[i]t is also not our job to second guess the department on the wisdom of failing to adopt the aforementioned rules." He discussed Bender as controlling (footnote in original):

> I see no reason to treat the failure to adopt rules relating to the preservation of the blood samples [here] any differently than the failure to adopt rules relating to the maintenance of the machines [in Bender]. As in *Bender*, the defendant in this case would have on remand an opportunity to attack the reliability of the testing procedures, notwithstanding the statutory presumptions.[4] There is no material difference between the constitutional attack rejected by the court in *Bender* and the attack raised by appellee in the instant case. Therefore, there is no denial of due process.
>
> [4]It should be noted that at this stage of the trial court proceeding, there was no showing that the blood sample was improperly stored or preserved.

SUMMARY OF ARGUMENT

Respondent allegedly killed one person and injured another while driving impaired or with a blood alcohol level of 0.08 or higher. Relying upon the theory that a gap in FDLE rules regarding the preservation of blood samples fatally undermines the reliability of alcohol test results on them, the trial court and the DCA have excluded the permissive inference of Respondent's impairment based upon his 0.10 blood alcohol test. Without correction from this Honorable Court, the DCA's decision will negatively and erroneously impact not only the instant prosecution but also many others.

The State respectfully submits that the trial court order and DCA opinion affirming it are erroneous for two main reasons: (1) The supposed gap in the rules is actually no gap at all or is otherwise insignificant because general evidentiary principles cover the subject and because there has been no showing that any such "gap" has had any negative impact on the accuracy of actual blood alcohol test results in Florida in general. And, (2) Respondent failed to meet his burden of establishing that the blood alcohol result and

attendant permissive inference of impairment, as applied to him in this case, were unreliable.

As, Judge Wolf's dissent pointed out, Bender controls. Bender essentially held that the rules need not be all-encompassing. Moreover, Bender placed the burden on the defense "in their individual proceedings to attack the reliability of the [blood test result]." Bender comports with several cases and principles that the State will discuss.

Therefore, like the body's general absorption [and metabolism] of imbibed alcohol discussed in Miller, some possible – and even actual – deterioration of a blood sample is simply a matter of the weight that the trier of fact may afford to the test result and to the attendant permissive inference concerning impairment.

ARGUMENT

CERTIFIED QUESTION[5]

WHERE THE STATE LAYS THE THREE-PRONGED PREDICATE FOR ADMISSIBILITY OF BLOOD-ALCOHOL TEST RESULTS IN ACCORDANCE WITH THE ANALYSIS SET FORTH IN *ROBERTSON V. STATE*, 604 SO. 2D 783 (FLA. 1992), THEREBY ESTABLISHING THE SCIENTIFIC RELIABILITY OF THE BLOOD-ALCOHOL TEST RESULTS, IS THE STATE ENTITLED TO THE LEGISLATIVELY CREATED PRESUMPTIONS OF IMPAIRMENT?

The majority of the DCA panel essentially affirmed the trial court's declaration of the FDLE rules as unconstitutional on the due-process ground that they fail to adequately specify means to

[5] This Honorable Court has discretionary jurisdiction because the DCA majority opinion certified that it "passe[d] upon a question ... of great public importance," Fla. Const. Art. 5 § 3(b)(4). Accord Fla. R. App. P. 9.030(a)(2)(A)(v) ("pass upon a question certified to be of great public importance").

preserve blood samples. The certified question assumes the fatal constitutional infirmity of the FDLE rules.

The State contends that the ruling of the trial court, as a matter of law reviewed on appeal de novo without any deference to the trial court,[6] was erroneous and that the DCA majority opinion affirming it was also. As a matter of law, the trial court and the majority of the DCA panel did not afford the proper deference to Chapter 316, Fla. Stat., and the FDLE rules. Respondent bore the burden of showing that FDLE's rules were "clearly erroneous." Compare Pan American World Airways, Inc. v. Florida Public Service Com'n, 427 So.2d 716, 719 (Fla. 1983) ("administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to **great weight** and should not be overturned unless **clearly erroneous**")[7] with Robertson v. State, 604 So.2d 783, 789 n. 6 (Fla. 1992) ("defense might challenge the HRS regulations themselves as being scientifically unsound, but the **burden would**

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[6] See, e.g., Operation Rescue v. Women's Health Center, 626 So. 2d 664, 670 (Fla. 1993) (purely legal matters ... is "subject to full, or de novo, review on appeal"); U.S. v. Sasnett, 925 F.2d 392 (11th Cir. 1991) (trial court's interpretation of law reviewed on appeal de novo).

[7] All emphasis through bold lettering is supplied unless the contrary is indicated.

rest on the defense to prove this point").[8] Respondent did not meet his burden for several reasons.

In accordance with the de novo standard of review and Respondent's burden, the State respectfully submits the following issues, which bifurcate the certified question and specify the purported area of the rules' inadequacy, for this Honorable Court's consideration.

ISSUE I

DID RESPONDENT SHOW THAT THE FDLE RULES, UNDERLYING THE STATUTORY "PRESUMPTION" CONCERNING IMPAIRMENT AND PROMULGATED UNDER CHAPTER 316, FLA. STAT., CLEARLY VIOLATED DUE PROCESS ON THE GROUND THAT THEY DO NOT ADEQUATELY ASSURE THE PRESERVATION OF THE BLOOD SAMPLE?

A. The trial court and the majority of the DCA panel ignored the totality of legislative and agency constraints upon the blood alcohol testing procedures.

Respondent failed to meet his burden of showing that the totality of legislative and FDLE-rule constraints on the blood alcohol testing procedures insufficiently provide a rational nexus between a blood alcohol result of .08 or higher and permissively inferred impairment. This failure was illustrated by Respondent's failure to show specific real-world instances of unreliable blood alcohol test results in Florida.

The excluded "presumption" at issue here is actually a permissive inference that is the functional equivalent of evidence of

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[8] To meet the clearly erroneous test, the deficiency must be "more than just maybe or probably wrong; it must ... strike [the reviewing court] as wrong with the force of a five-week old, unrefrigerated dead fish." Hiram Walker & Sons, Inc. v. Kirk Line, 30 F.3d 1370, 1378 n. 2 (11th Cir. 1994)(Judge Dubina, concurring specially) quoting Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir.1988).

impairment. Depending on the level of alcohol, this evidence of impairment is simply one fact to be considered with others or can be, alone, probative enough to overcome a motion for judgement of acquittal on the element of impairment. See State v. Rolle, 560 So.2d 1154, 1156 (Fla. 1990) (discussing blood alcohol levels as "evidence relevant to impairment" and "prima facie evidence" of impairment). As such, the basic question is whether there is "'**no** rational way the trier [of fact] could make the connection permitted by the inference," 560 So.2d at 1156, quoting County Court v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979).[9]

Thus, the test is **NOT** whether there **COULD BE** a stronger rational connection, but rather whether there is **ANY** "rational" connection between (1) the blood alcohol result of ".08 or higher," §316.1934(c), Fla. Stat., obtained pursuant to the applicable rules and statutes and (2) permissively inferred impairment. See also §90.401, Fla. Stat. (definition of relevant evidence; "tend[s] to prove or disprove [the] material fact").

Here, the State respectfully submits that, when viewed in their totality and in the context of applicable DUI statutes and evidentiary rules, the FDLE rules are not so infirm that there is **NO** rational connection. Indeed, the rational connection is strong.

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[9] Allen, 442 U.S. at 156, 99 S.Ct. at 2224 (citation omitted), explained: "Inferences and presumptions are a staple of our adversary system of fact-finding. It is often necessary for the trier of fact to determine the existence of an element of the crime--that is, an 'ultimate' or 'elemental' fact--from the existence of one or more 'evidentiary' or 'basic' facts."

In situations without the subject's explicit consent, **FLORIDA STATUTES** limit law enforcement to:[10]

- Have "probable cause to believe that" a DUI person "caused the death or serious bodily injury of a human being, §316.1933(1), Fla. Stat.;
- Performing the "blood test ... in a reasonable manner," Id.;
- Requesting only listed persons, with pertinent skill, to draw the blood, §316.1933(2)(a), Fla. Stat.;
- Using for the permissive inference only the blood that it requested Id.;
- Analyses of blood performed by those with valid FDLE permits that concern qualifications and competence to perform the analyses, 316.1933(2)(b), Fla. Stat.;
- Analyses of blood performed "substantially in accordance with methods approved by" FDLE, E.g., 316.1933(2)(b), Fla. Stat.

See also §316.1934(5), Fla. Stat. (prerequisites to admissibility of affidavit).

FDLE RULES (attached to this brief as Appendix C) require:

- Analysis of the blood sample through "Alcohol Dehydrogenase" or "Gas Chromatography," Fla. Admin. Code R. 11D-8.011;
- Blood sample vials or tubes labeled with the "Name of person tested," "Date and time sample collected," "Initials of personnel collecting the sample," Fla. Admin. Code R. 11D-8.012(1);

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[10] Section 316.1932, Fla. Stat., provides additional avenues for obtaining a blood test and also contains attendant constraints and limits.

- Any "[c]leansing of the person's skin in collecting of the blood sample ... with a non-alcoholic antiseptic solution," Fla. Admin. Code R. 11D-8.012(2);
- "Blood samples ... be collected in a vial or tube" that contains "an anticoagulant substance," Fla. Admin. Code R. 11D-8.012(3);
- The vial or tube to be "stoppered or capped to prevent loss by evaporation," Id.;
- The analyst to have been permitted through Fla. Admin. Code R. 11D-8.013 and 11D-8.014, which impose very detailed requirements, including, for example,
  - detailed assurances pertaining to the accuracy of the analytical procedure,
  - detailed proficiency testing, and
  - prerequisite training through specified licensing or through education; and,
- The analyst to maintain proper records and several other prerequisites specified in Fla. Admin. Code R. 11D-8.015.

Thus, there are a plethora of protections built into existing statutes and FDLE rules upon which the statutory presumptions pertaining to impairment are based. There is **A** rational connection. In this context, the trial court and the DCA would have FDLE adopt yet-more rules, thereby, in Tom Woods' words, creating a "monster." The law does not require a "monster" or any more rules regarding preservation.

Moreover, consistent with the explicit statutory provision that the blood alcohol test must be

- "otherwise admissible," §316.1934(2), Fla. Stat., **STANDARD RULES OF EVIDENCE** concerning the preservation and transportation of evidence address the concerns of the trial court, if and when those concerns materialize in an actual case. Here, **CASE LAW REGARDING CONTAMINATED EVIDENCE** is bountiful and available to defendants upon a proper showing by them. See, e.g., Terry v. State, 668 So.2d 954, 959 n. 4 (Fla. 1996) (blood sample; "we ... find no 'indication of probable tampering with the evidence' to support appellant's claim that there was a break in the chain of custody"; defense's bare allegation, insufficient); Parker v. State, 456 So.2d 436, 443 (Fla. 1984) (rejected defense attack on break in chain of custody; "Nothing in the record shows evidence of tampering"); Peek v. State, 395 So.2d 492, 495 (Fla. 1981) (hair comparison analysis); Ehrhardt, Florida Evidence §901.3 Chain of Custody ("Where no evidence of tampering is introduced, a presumption of regularity supports the official acts of police officers"). See also Taplis v. State, 703 So.2d 453 (Fla. 1997) ("once evidence of tampering is produced, the proponent of the evidence is required to establish a proper chain of custody or submit other evidence that tampering did not occur"; harmonizing two DCAs' cases).

The availability of this case law obviates a "monster" set of rules, yet affords protection against unreliable evidence.[11] Jordan v.

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[11] Although the defense expert thought that more should be in the FDLE rules, he conceded that regardless of what is put into the rules, there would always be something missing: "there's always going to be a problem no matter what kind of rule you

State, 707 So.2d 816 (Fla. 5th DCA 1998), result approved on other ground 720 So.2d 1077 (Fla. 1998), correctly applied this principle to blood alcohol test results in upholding the admissibility of the blood alcohol result because the **defense failed to meet its burden**: "Jordan failed to establish a probability of tampering with her blood sample."[12]

Miller v. State, 597 So.2d 767, 769 (Fla. 1991), in reviewing the relevance and probative value of Chapter 316 blood test results vis-a-vis unfair prejudice, recognized the applicability of general evidentiary rules:

> Initially, we must disagree with the suggestion made by the district court that the admissibility of blood-alcohol test evidence is determined solely by reference to sections 316.1932 and 316.1933, Florida Statutes (1987). This **evidence continues to be subject to all other applicable precedent and rules regarding the admissibility of evidence.**

Thus, under Miller, FDLE rules need not be all-comprehensive in an area where, due to the human body's absorption [and metabolism] of alcohol, it is almost certain that the blood test result differs from a reading that would accurately reflect alcohol content at the time of driving. See also Pan American World Airways, Inc. v. Florida Public Service Com'n, 427 So.2d at 719-20 ("whether the PSC erred in determining that FPL's applicable deposit policy did not have to be enacted as a rule in its tariff in order to be enforceable"; PSC's reading of its rules ... has not been shown to be clearly erroneous").

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write" (II 279).

[12] The DCA opinion here, by placing the burden on the State to prove reliability, ..., is in conflict with Jordan.

Although unnecessary for the resolution of the issue, FDLE's position is distinctive. As a matter of law, the Criminal Justice Standards and Training Commission, §943.10(5), Fla. Stat., within FDLE, §943.11(1)a), Fla. Stat., is charged by statute with, inter alia, "[e]stablish[ing] uniform minimum training standards for the training of officers in the various criminal justice disciplines," §943.12(5), Fla. Stat. Thus, FDLE's dual role in blood alcohol rule making and police training standards place it in a distinctive institutional position to adopt rules that, in the words of the 20-year FDLE veteran, "balance" "facility of administration" by avoiding rules that state the "obvious" (I 89, 105) while assuring "accurate and reliable results" (I 87).

Carino v. State, 635 So.2d 9, 10 (Fla. 1994), adopted the opinion of State v. Rochelle, 609 So.2d 613 (Fla. 4th DCA 1992). Rochelle reversed a trial court order that excluded breathalyzer test results. In rejecting an equal-protection attack on then-applicable HRS rules/forms, Rochelle reasoned, in part, that pertinent rules need not include all factors that may bear upon the reliability of the test. The defense can attack such matters and the resulting "presumption":

> As is clear from the cases, one who discovers he was tested with an inaccurate machine or a machine whose accuracy is suspect because of the way the machine was checked for accuracy and reproducibility **can attack admission of the test results in his case or the applicability of the statutory presumptions on which the state relies**. Similarly, one presumes a **diabetic who produces acetone metabolically can attack the reliability of the test result in his case** if the machine used does not discriminate between alcohol and acetone. Notwithstanding the foregoing, one cannot claim discriminatory treatment if one was not unfairly treated, **merely** because it is **possible** someone was unfairly treated.

609 So.2d at 618. Thus, the rules need not be all-encompassing to provide a threshold for admissibility and the applicability of the "presumption." Accord State v. Berger, 605 So.2d 488, 491 (Fla. 2d DCA 1992) ("entire administrative scheme sufficiently ensures the reliability of results even though it does not set forth specific standards with reference to monthly and annual inspections") approved Veilleux v. State, 635 So.2d 977, 978 (Fla. 1994) citing Mehl v. State, 632 So.2d 593 (Fla. 1993).[13]

Here, the trial court erroneously focused upon one rule and ignored the panoply of existing Chapter 316/FDLE protections, as supplemented with basic evidentiary principles. Likewise, the majority panel of the DCA ignored these existing protections.

Here, similar to Rochelle's example of the **possibility** of a diabetic confounding test results, speculative factors pertaining to preservation **may affect** the result in any given case, but, such factors are not grounds for striking down the permissive inference. See also Wissel v. State, 691 So.2d 507, 508 (Fla. 2d DCA 1997) ("attack, based on the lack of a rule or regulation to cover every step of the testing procedures for breath test instruments, is not only speculative and theoretical, but also hyper-technical"). Cf.

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[13] Concerning the inapplicability here of Mehl's dicta, the State adopts, as its own, Judge Wolf's reasoning in his dissent here. Moreover, unlike Mehl's situation, here general evidentiary rules afford any requisite protection, as discussed supra. Further, Mehl did not specify the totality of existing constraints on law enforcement, to which the totality here, as delineated in "bullets" above, could be compared in a "precedential" analysis of Mehl's dicta. Further still, here even the defense expert acknowledged that FDLE labs "certainly are using state-of-the-art equipment" and that FDLE people are "qualified" (II 269).

L.B. v. State, 700 So.2d 370, 372 (Fla. 1997) ("We may assume, for the sake of argument, that in some **peripheral cases** it may not be clear whether a particular pocketknife is a 'common' pocketknife ... insufficient to strike a statute as unconstitutionally vague")

Indeed, a coup de grace of the trial court's and the DCA-majority's position is that there was **no evidence of actual, specific unreliable blood alcohol results in Florida due to a lack of rules**. Instead, there were only **possibilities** "based upon" categorical aspersion upon Florida police officers by an out-of-state defense expert who, "once upon a time", "**may have** read" (II 272) pertinent Florida statutes.

The impact of **possible** problems are thus academic, and, as such, they should not be the basis for excluding the permissive inference provided pursuant to the patent legislative intent of strictly enforcing Florida's DUI laws. See, e.g., §316.193 and its extensive legislative history (penalty section for DUI). A fortiori, here, the blood testing procedures involve the death of another human being (James Mulloy), i.e., DUI Manslaughter, and injury to yet another human being (Ralph Keith Nelson), i.e. DUI Causing Personal Injury (I 1. See I 3-4).

In summary, the trial court's exclusion of the permissive inference, and therefore the majority-panel of the DCA's affirmance of it, exalt academic possibilities in one narrow area over real-world practices and thereby exalt form over substance. In the words of the legislature, any topics missing from the rules are "insubstantial" in Florida, §316.1934(3) ("substantially in accordance with"; "Any insubstantial differences ..."). See also §316.1933(2)(b), Fla. Stat. ("Any

insubstantial differences ..."); §316.1932(1)(f)1 ("substantially in accordance with"). There was no due process violation.

B. The trial court's and the DCA's concerns pertain to the weight of the evidence (permissive inference) they excluded, not its admissibility.

As indicated above, a permissive inference is the functional equivalent of evidence that the jury may consider. It is well-settled that there is a distinction between the threshold for admissibility and the ability of a party to attack the weight to be accorded the admitted evidence. See, e.g., Delap v. State, 440 So.2d 1242, 1253 (Fla. 1983) ("To be admissible, a medical expert's opinion as to the cause of an injury or death does not have to be expressed in terms of a reasonable medical certainty ..., but the weight to be given it is a matter to be determined by the jury"); U.S. v. Kubiak, 704 F.2d 1545, 1552 (11th Cir. 1983) ("evidence regarding a chain of custody does not affect admissibility, only the weight of the evidence").

Miller v. State, 597 So.2d at 770, applied this principle so that an absence of evidence relating a blood alcohol test result to the time of driving was not fatal to the use of that evidence in trial. Miller concerned factors pertaining to the human body's absorption of alcohol that **certainly** cause a blood test result to differ from actual blood alcohol content at the time of driving. Such factors in Miller generally affect only "credibility and weight-of-the-evidence, not of admissibility," 597 So.2d at 770, unless the factors in the defendant's specific case are fatally problematic. Likewise, here, Respondent's attack concerns factors pertaining to the accuracy of a blood test result. However, a fortiori, unlike

Miller, here it is **merely possible** that the factors (supposedly missing from FDLE-rule coverage) could affect the result. Here, unless Respondent shows that the factors are especially problematic and unexplained[14] **in his case**, under Miller, even some actual deterioration in the blood merely affects the weight of the evidence; it does not exclude it. See State v. Bender, 382 So.2d at 699 (Fla. 1980) (after State satisfies statute and rules, "fact finder may presume that the test procedure is reliable" and apply "presumption," but "[t]he presumptions are rebuttable, and a defendant may in any proceeding attack the reliability of the testing procedures" and "the presumptions" regarding impairment); U.S. v. Brannon, 146 F.3d 1194 (9th Cir. 1998) (incomplete breath sampling, although not recommended in scientific literature and lowering reliability of the tests, admissible and subject to cross-examination; all scientific testing "known to humanity is subject to error").

Thus, citing Bender, Robertson v. State, 604 So.2d 783, 789 n. 6 (Fla. 1992), noted that "the defense still has the opportunity to rebut the presumption created by the statute."

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[14] Analogous to expert testimony "relating back" a blood test result over an extensive time, the State could overcome a showing of deterioration of the blood sample significantly affecting the test result if it adduced competent and otherwise admissible evidence explaining what the result would have been from that sample without the deterioration. Where competent and otherwise admissible evidence "relates back" the test result over an extended time or, here, compensates for significant deterioration, the blood test becomes relevant and probative, with its weight to be determined by the jury. Thus, Miller held that the test need not "relate back" a test result to the time of driving where the temporal gap is reasonable.

C. The trial court and the DCA erroneously ignored the basic test for a permissive inference, i.e., requiring the party challenging it to demonstrate its invalidity as applied to him.

The State respectfully submits that the DCA erroneously ignored the basic distinction between the permissive inference here and a mandatory presumption.

This Court in State v. Rolle, 560 So.2d 1154, 1156 (Fla. 1990), recognized County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), as a leading authority on permissive inferences. Allen, 442 U.S. at 157-60, 99 S.Ct. at 2224-26, distinguished a "mandatory presumption," which "tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts."

For a mandatory presumption, constitutional validity is determined on the face of what the jury is told, not the evidentiary facts of the case, See 442 U.S. at 159-60. In contrast to a mandatory presumption, the constitutional validity of a permissive inference depends upon the evidence in particular case under review, and the challenger of the inference bears the burden of "demonstrat[ing] its invalidity as applied to him":

> When reviewing this type of device, the Court has **required the party challenging it to demonstrate** its invalidity **as applied to him**. *** Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, **under the facts of the case**, there is **no rational way** the trier could make the connection permitted by the inference. For only **in that situation** is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

442 U.S. at 159, 99 S.Ct. at 2224-25. The test for the rationality of a permissive inference is whether, under the facts of the case, it is "more likely than not" that "the ultimate fact presumed" flowed from "the basic facts that the prosecution proved," 442 U.S. 165-66, 99 S.Ct. 2228-29. Thus, the test becomes whether, under the facts of this case, Respondent established that it was not "more likely than not" that he was under the influence, given the "basic fact" of the blood alcohol test result.

This burden on the opponent of a permissive inference to attack it comports with the discussions of the rules on their face (Section A supra) and the weight of the evidence (Section B supra). The general rule of evidence affords the opportunity to the opponent of the evidence to show contamination under the facts of his/her case, See Terry; Parker; Taplis; Ehrhardt supra, and, at some level of contamination, the reliability of the permissive inference would be fatally undermined. And, Miller's analysis focused upon the "the facts of each case," 597 So.2d at 770. Accord State v. Wills, 359 So.2d 566, 569 (Fla. 2d DCA 1978) (breath testing; dissent; "*** Nor was there any evidence that the test results were inaccurate in any way ***") dissent approved State v. Donaldson, 579 So.2d 728, 729 n. 2 and accompanying text (Fla. 1991) (specific facts of case analyzed). If there is any rational nexus between the test result and the inference, See Rolle; Allen, any weaknesses in it becomes a matter of weight for the jury to consider.

Marcolini v. State, 673 So.2d 3 (Fla. 1996), discussed inferences at length, quoted the DCA's reliance there upon Allen, and agreed with the DCA's reversal of a trial court order striking down a

portion of Section 812.14, Fla. Stat. The statutory provision authorized a finding of a prima facie violation (there, Theft of Electricity) of that section upon proof of a "diversion or use of the services of [the] utility" under certain circumstances. This Court agreed with the DCA, which had held that the statute created a permissive inference, requiring an as-applied analysis, which looks to the specific facts of the case under review to determine if it is "more likely than not" that the inferred fact flows from the proved facts.

Here, Allen's burden upon the challenger of the permissive inference is compounded by the presumption that the agency with expertise in the scientific area has correctly identified where its rules should be focused. See Pan American World Airways, Inc. v. Florida Public Service Com'n, 427 So.2d at 719.

Here, Respondent not only failed to meet his burden of establishing under the facts of this case, the permissive inference was invalid "as applied" to him (Allen; Marcolini) he affirmatively attempted to exclude those facts in the hearing below (See I 113, 116). In spite of Respondent's efforts, the trial court correctly noted that thus-far all indications point to the reliability of the blood alcohol test here (II 313: "a lack of any evidence to establish that the analysis was unreliable"), specifically pointing out that:

- "the sample was drawn in mid-December and the analysis was conducted in early January" (II 313), that is, in "**winter**" (II 313), thereby reducing and perhaps eliminating any possible effects of heat;
- the sample was "contained in a **stoppered tube**" (II 313);

- the stoppered tube "contained an **anticoagulant and a preservative**" (II 313).

Accordingly, the FDLE analyst testified, for example (I 117, 119):

> In this case the blood when examined by tipping the vial back and forth flowed freely. There was no clots. There was nothing to indicate that it was deteriorated. I did not have to grind it with a tissue grinder in order to analyze it. Therefore, I would say it was not deteriorated.
> ***
> It was gray stoppered.

See People v. Ruppel, 708 N.E.2d 824 (Ill. 4th Dist. 1999) ("vials were gray-toppped, which indicates the tube contains a preservative and anticoagulant"; visible clotting would indicate insufficient preservative or anticoagulant).

In excluding the permissive inference, the trial court erroneously relied upon **possible** facts and dismissed, as irrelevant, facts of this case. (See II 312: "can either decrease or increase ...," "rule itself appears to be deficient ...," "omission of the statute and deficiencies of the rule ..."; II 313: "rule ... is inadequate")

The DCA erroneously affirmed the trial court's exclusion of the permissive inference and erroneously recognized the significance of the facts of a case too late by placing the burden on the State to prove the common law "three-pronged predicate described in *Bender*." Once the State shows compliance with Chapter 316 and FDLE rules (not Bender's three prongs), the burden should be on the defendant to show unreliability. The DCA compounded its error by imposing the burden on the State to prove three "prongs" (reliability, qualified operator and proper equipment, and expert interpretation), where the supposed deficiency pertained to only one aspect (preservation)

of only one them (reliability), thereby further ignoring existing statutes and rules on the qualifications of the operator, prerequisites to proper equipment, and the meaning of the result regarding permissively inferred non-impairment (.05 or less) or impairment (.08 or more).

The State submits that the trial court erred in its fact-less exclusion of the permissive inference, and the DCA erred in placing the common-law burden on the State, and both the trial court and the DCA thereby ignored the existing protections of Chapter 316/FDLE rules.

D. State v. Bender, 382 So.2d 697 (Fla. 1980), controls.[15]

The State respectfully submits that Judge Wolf's dissent in the instant case correctly identified the controlling nature of Bender, which held, 382 So.2d at 700:

> We further reject the trial court's holding that the respondents' constitutional rights of due process and equal protection were violated by the failure of the Department of Health and Rehabilitative Services and the Department of Highway Safety and Motor Vehicles to incorporate the manufacturers' procedures for maintenance and operation as part of the promulgated rules. We note that the rules under attack require the preventive maintenance operation and preventive maintenance check to be in accordance with the procedures set forth by the manufacturer. What is attacked is the failure to attach and file those procedures with the Secretary of State. This does not constitute a due process or equal protection violation. There is no showing that these manufacturers' operating manuals are unavailable, and the respondents clearly have the right in their individual proceedings to attack the reliability of the testing procedures or the operator's qualifications.

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[15] Because Bender controls, conflict between it and the DCA decision provides alternative discretionary jurisdiction for this Court.

Consistent with Miller's and Rochelle's discussions, Bender held that the rules need not be all-encompassing. Consistent with Pan American World Airways (Fla. 1983), Robertson (Fla. 1992), Allen (U.S. 1979), Terry (Fla. 1996), and Jordan (Fla. 5th DCA 1998), Bender placed the burden upon the defendant once the State has shown "compliance with the statutory provisions and the administrative rules enacted by its authority," 382 So.2d at 699.

Here, applying Bender, "[t]here is no showing that [evidentiary principles concerning preservation] are unavailable, and the respondents clearly have the right in their individual proceedings to attack the reliability of the [blood test result]." Judge Wolf's dissent put it well:

> I see no reason to treat the failure to adopt rules relating to the preservation of the blood samples any differently than the failure to adopt rules relating to the maintenance of the machines [in Bender].

Under Bender and cases consistent with it, the State respectfully submits that the DCA erred in affirming the trial court's requirement that FDLE rules specify conditions of preservation of the blood sample and erred in placing the burden of proving reliability upon the State.

ISSUE II

IF THE FDLE RULES, UNDERLYING THE STATUTORY "PRESUMPTION" CONCERNING IMPAIRMENT AND PROMULGATED UNDER CHAPTER 316, FLA. STAT., VIOLATE DUE PROCESS ON THE GROUND THAT THEY DO NOT ADEQUATELY ASSURE THE PRESERVATION OF THE BLOOD SAMPLE, MAY A PARTY STILL BENEFIT FROM THE "PRESUMPTION" UPON A SHOWING THAT THE SAMPLE WAS PROPERLY PRESERVED?

ISSUE II paraphrases the Certified Question. However, it is rephrased so that it reflects the ruling of the trial court, based solely upon preservation of the blood sample and so that it reflects

the "presumption" that may apply for a defendant's benefit upon a showing of blood alcohol level of .05 or less.

As discussed in ISSUE I, Section C, the State agrees with the DCA-majority's determination that the facts of a particular case can render the permissive inference valid – although the DCA allowed for their consideration in placing the burden on the wrong party using the wrong test. An opponent of an otherwise applicable Section-316.1934 permissive inference should be allowed to attack the reliability of the test under the facts of his/her case, and, the proponent, the opportunity to respond.

Thus, under a proper **factual** analysis triggered by defense-adduced evidence, the certified question is already answered. If, factually in a given case, it is **not** "more likely than not" that the blood alcohol test result of .08 or higher (predicate for permissive inference) indicates impairment (inference derived from predicate), then the State would not be entitled to the permissive inference, i.e., the "presumption" of Section 316.1934. On the other hand, if the State shows that it substantially complied with Chapter 316 and FDLE rules and if Respondent fails to meet his burden as "the party challenging it to demonstrate its invalidity as applied to him," then the State would be entitled to the permissive inference.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be rephrased, the decision of the majority of the District Court of Appeal panel should be disapproved, and the Order entered in the trial court should be reversed with instructions to the trial court, upon proper defense motion, to

conduct a full evidentiary hearing pre-trial or at-trial in which the State would be afforded the opportunity to show its substantial compliance with applicable provisions of Chapter 316 and FDLE rules, and if it meets that burden, the defense would be afforded the opportunity to establish the unreliability of the blood alcohol test under the facts of this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

STEPHEN R. WHITE
FLORIDA BAR NO. 159089
ASSISTANT ATTORNEY GENERAL
CAPITAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4580

COUNSEL FOR PETITIONER
[AGO# L99-1-6597]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the PETITIONER'S INITIAL BRIEF ON THE MERITS and its Appendix have been furnished by U.S. Mail to Barry W. Beroset, Esq., Beroset & Keene, 417 East Zaragoza St., Pensacola, FL 32501, this 28th day of May, 1999.

Stephen R. White
Attorney for the State of Florida

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