IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE No.: 95,490

MICHAEL RANDY MILES,

Respondent.

_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL FOR

THE FIRST DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

BARRY W. BEROSET
Beroset & Keene
417 East Zaragoza Street
Pensacola, Florida 32501
Phone: (850) 438-3111
Florida Bar No.: 145143
Attorney for Respondent

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

PRELIMINARY STATEMENT

The Petitioner, State of Florida, shall be referred to as either "Petitioner" or "State."

The Respondent, Michael Randy Miles, was the appellee/defendant below and shall be referred to as "Respondent" or "Defendant."

The two-volume record on appeal shall be referred to as "(R-volume number-page number)."

Petitioner's Initial Brief on the Merits shall be referred to as "Pet. Brf. - page number."

STATEMENT OF THE CASE

The First District Court of Appeal ("DCA") certified the following question to the Florida Supreme Court as a question of great public importance:

> "Where the state lays the three-prong 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 presumption of impairment?"

State v. Miles, 24 FLW D311c (Fla. 1st DCA January 27, 1999) (See Appendix A). The First DCA's opinion stemmed from an interlocutory appeal from the 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 F.D.L.E. Regulations ("Order") (See Appendix B); the Florida Department of Law Enforcement ("FDLE") rules at issue

were promulgated under the Implied Consent Statutes, §§316.1932 through 316.1934, Fla. Stat. (1995) (hereinafter "Rules") and specifically FDLE Rule 11D-8.012 Florida Administrative Code.

Petitioner filed a Notice to Invoke Discretionary Jurisdiction of this Court on the basis that the certified question passes upon a questions of great public importance.

On May 5, 1999, this Court entered an Order Postponing Decision on Jurisdiction and Briefing Schedule and ordered the Petitioner and Respondent to submit briefs on the merits.

STATEMENT OF FACTS

Petitioner's Initial Brief sets forth a Statement of the Case and Facts which omits significant factual matters which will be supplemented as follows:

In its Order on Respondent's Motion to Suppress (See Appendix B), the trial court noted:

> "This motion presents the Court with a very narrow question as to whether Rule 11D-8.012, FAC, meets due process requirements. In this case, the Defendant (Respondent) was in an automobile accident which resulted in the death of a passenger of another vehicle. Without the consent of the Defendant, the law enforcement officers on the scene required the Defendant to submit to a blood draw pursuant to §316.1933, Florida Statutes(1995). There is no issue in this case regarding the method of the blood draw, nor is there an issue in this case of the analysis of the blood sample. The sole issue relates to the due process adequacy of the rule relating to 'preservation' of blood samples drawn pursuant to the aforesaid Statute." (RII-311)

The trial court's Order noted that FDLE Rule 11D-8.012, which provides for the

collection of a blood sample, has no provision relating to the need to have the sampling vial or tube contain a preservative, and that there is no provision regarding the conditions in which the samples should be maintained or stored pending analysis. The trial court further noted that there was no provision in the Rules relating to the method of transportation of the sample. (RII-312) The trial court's Order further noted, relating to the testimony of both the State's and Defendant's experts, that:

> "The undisputed testimony is that the blood alcohol content contained in a sample can either decrease or increase depending on whether the sample is exposed to extreme heat or whether the sample contains any bacteria, respectively. It is uniformly recommended that the sample be kept refrigerated." (RII-312)

The trial court found that the Rules appear to be deficient with regard to the critical issues of maintaining a reliable sample. The trial court also found that the statute and Rules do not comply with the core policies announced in State v. Bender, 382 So.2d 697 (Fla. 1980). (RII-312) Based upon a review of the statute and Rules, and the testimony of both State and defense witnesses, the trial court ruled:

> "The state will not be entitled to a presumption pursuant to 316.1934 Florida Statutes (1995). The parties will be permitted to establish the circumstances of the preservation, storage and transportation of the sample in question pursuant to the authority of Robertson v. State, because §316.1933(2)(b) excludes requirements relating to preservation, storage, and transportation of samples drawn, and the rules adopted by the Florida Department of Law Enforcement on these issues are inadequate to protect the 'core policies' of the State of Florida to ensure an accurate analysis of the blood sample drawn pursuant to §316.1933, Florida Statutes (1995)." (RII-313)

SUMMARY OF ARGUMENT

It is noteworthy that Petitioner seeks to invoke the jurisdiction of this Court on the basis that the question certified by the First DCA is a question of great public importance. However, it is equally noteworthy that the Petitioner's argument on this issue consists of approximately one single page of the 30 page brief. See Pet. Brf. at 28. Respondent submits that, since Florida's implied consent law creates a legislative presumption of intoxication, if the Rules implementing the statute are inadequate to insure the preservation of the blood sample, i.e., proper collection, storage and transportation, then the statute and Rule do not provide adequate due process protection and the Petitioner should not be entitled to a statutory presumption of intoxication.

The trial court made factual findings based upon the testimony of both State and Defendant's experts' undisputed testimony that blood alcohol content contained in a sample can either increase or decrease depending upon whether the blood sample is exposed to extreme heat, or whether the sample contains any bacteria. Furthermore, it is uniformly recommended that the sample be kept refrigerated. The trial court further found that the sole issue in this case relates to the adequacy of the Rule in relation to due process protections with respect to the preservation of blood samples drawn pursuant to §316.1933, Fla. Stat. (1995). The trial court reviewed FDLE Rule 11D-8.012 and found that there was no provision in the Rule requiring a preservative. There was also no rule relating to the conditions under which the sample should be stored or maintained. Based

upon the foregoing, the court found that the Rule appears to be deficient in order to maintain and insure a reliable sample for analysis.

The trial court's decisions resolving legal questions are subject to the de novo standard of review, while factual findings are entitled to deference commensurate with the trial judge's superior advantage point for resolving factual disputes unless clearly erroneous. The undisputed testimony indicates that blood samples can be compromised if not subject to proper collection, storage, and transportation, and the trial court found that the Rule is adequate to insure said proper collection, storage, and transportation.

Respondent submits that the admissibility under Florida's implied consent law of a blood sample would be violative of the Respondent's right to due process of law. The State is not entitled to the presumption of intoxication set forth in §316.1934, Fla. Stat. (1995), absent compliance with administrative Rules unless they afford Respondent due process protection.

ARGUMENT

CERTIFIED QUESTION

WHERE THE STATE LAYS THE THREE-PRONGED PREDICATE FOR ADMISSIBILITY OF BLOOD-ALCOHOL TESTS 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 First DCA affirmed the trial court's finding that FDLE Rule 11D-8.012 is inadequate on due process grounds because the Rule fails to adequately specify means to preserve the blood sample. There are no provisions requiring a preservative in a collection tube or vial, nor any instruction on the handling, transportation, or storage of the blood sample pending analysis. However, the majority of the First DCA did hold that the legislatively created presumption with respect to impairment is applicable to the blood-alcohol test results in the event that the State lays the three-prong predicate described in Robertson v. State, 604 So.2d 783 (Fla. 1992).

Respondent respectfully submits that this Court has already answered this certified question in State v. Bender, 382 So.2d 697, 700 (Fla. 1980):

> "We note that where motor vehicle driver intoxication is not involved, the implied consent provision is inapplicable, and consequently, the results of blood alcohol tests are admissible into evidence without compliance with the administrative rules if the traditional predicate is laid which establishes the reliability of the test, the qualifications of the operator, and the meaning of the test results by expert testimony. **None of the statutory presumptions can apply in the absence of compliance with the administrative rules**." (emphasis added)

Other courts have recognized that minimum requirements ensuring scientific reliability must be in place prior to the state availing itself of the presumption of intoxication. In State v. Tanner, 457 So.2d 1172, 1175 (La. 1984) the Supreme Court of Louisiana stated:

> "When the legislature authorized the chemical analysis of a motorist's blood and created a statutory presumption of intoxication in the event that his blood contained the requisite percent of alcohol, it conditioned the

> validity of the chemical test upon its having been performed according to methods approved by the Department of Public Safety. . . . This court has repeatedly recognized the importance of establishing safeguards to guarantee the accuracy of chemical tests. In a criminal prosecution, before the state may avail itself of the statutory presumption of defendant's intoxication, arising from chemical analysis of his blood, without violation of his constitutional due process guarantee of a fair trial, it must show that the state has promulgated detailed procedures which will insure the integrity and reliability of the chemical test, including provisions for repair, maintenance, inspection, cleaning, certification, and chemical accuracy. It must also show that the state has strictly complied with the promulgated procedures."

With respect to the standard of review, Respondent does not agree with the Petitioner's contention as it relates to matters of law. Matters of law are subject to review on appeal de novo. Operation Rescue v. Women's Health Center, 626 So.2d 664 (Fla. 1993) Petitioner further notes that this Court has long recognized that the administrative construction of a statute by an agency or body responsible for the administration of the statute is entitled to great weight and should not be overturned unless clearly erroneous. See Pan American World Airways, Inc. v. Florida Public Utilities Commission, 427 So.2d 716, 719 (Fla. 1983) .

Petitioner references Hiram Walker & Sons, Inc. v. Kirkline, 30 F.3d 1370, 1376 (11th Cir. 1994), to define the clearly erroneous test:

> "The "clear error" standard of review imposes an especially heavy burden on the appellant in a case such as this, in which the evidence was largely testimonial, and the district court had the advantage of observing the witnesses and evaluating their credibility first hand."

See Pet. Brf. at 11, line 8. That is exactly the situation in the case, sub judice, where the

trial court heard testimony of both defense and State experts and concluded:

> "There is no provision in this rule relating to the need to have the vial or tube contain a preservative. There is no provision in the rule regarding the conditions in which the sample should be maintained or stored pending analysis. There is no provision in the rule relating to the method of transportation of the sample.
>
> The undisputed testimony is that the blood alcohol content contained in a sample can either decrease or increase depending on whether the sample is exposed to extreme heat or whether the sample contains any bacteria, respectively. It is uniformly recommended that the sample be kept refrigerated." (RII-312)

Accordingly, the trial court's factual finding should not be overturned unless clearly erroneous. As stated in State v. Setzler, 667 So.2d 343, 344-45 (Fla. 1st DCA 1995):

> "Aspects or components of the trial court's decision resolving legal questions are subject to de novo review, while factual decisions by the trial court are entitled to deference commensurate with the trial judge's superior vantage point for resolving factual disputes."

Of course this Court may review de novo the trial court's order to determine whether or not the trial court was correct when it found that Rule 11D-8.012, adopted by the FDLE adequately addresses the core policies of the State for preserving a sample which will result in an accurate analysis. However, the First DCA's factual finding should not be disturbed absent showing that they are clearly erroneous. Both testifying experts before the trial court, Wood and Burr, stated that the Rules did not provide any requirement that a preservative be used in the blood and that the absence of a preservative could compromise the blood sample. (R-102, 103; II-253)

Respondent has established that FDLE Rule 11D-8.012 is clearly defective and

invalid to insure a reliable sample. Respondent has met the burden of proving the invalidity of the implied consent Rules as demonstrated by the undisputed testimony of both the State and defense experts that the Rule does not require a preservative, nor any means for transportation or storage, and further that the blood alcohol sample, absent a preservative or proper storage is subject to compromise.

ISSUE I

RESPONDENT CLEARLY ESTABLISHED 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.

Petitioner has presented little, if any, persuasive argument on the certified question for which the State petitioned for review. See Pet. Brf. at 28-29, Issue II. Almost the entire Initial Brief submitted by the Petitioner is directed toward the issue of whether or not the rule promulgated under Chapter 316, Florida Statutes, violated due process of law. The trial court made no factual findings as to the reliability of the blood sample in this case, but merely examined the facial sufficiency of Rule 11D-8.012. Petitioner addresses the certified question briefly in its Initial Brief, yet cites no authority. See Pet. Brf. at 28-29.

A. Petitioner's Claim that Trial Court and the Majority of the DCA Panel Ignored the Totality of Legislative and Agency Constraints Upon the Blood Alcohol Testing Procedures is Unpersuasive.

At the hearing before the trial court on Respondent's Motion to Suppress, it was

clear that the trial court did not conduct a hearing to determine whether or not there was a proper predicate for the admission of the blood sample taken in this case. The trial court's order noted that "the parties will be permitted to establish the circumstances of the preservation, storage, and transportation of the sample in question pursuant to the authority of Robertson v. State." (RII-313) It is clear that the trial court made no factual findings as to the reliability of the blood sample in this case but was trying to determine the adequacy of Rule 11D-8.012 and its compliance with Florida Statutes.

Respondent is constitutionally "presumed to be innocent" in criminal proceedings. Petitioner is seeking the benefit of Section 316.1934(1)(c), Fla. Stat., and the statutory presumption that provides:

> "If there was at that time a blood-alcohol level... of 0.08 or higher, that fact is prima facia evidence that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired." Id.

Section 316.1933(2)(b), Fla. Stat. (1995), provides in pertinent part that the testing of a blood sample to determine alcohol content must be:

> "Performed substantially in accordance with the methods approved by the Department of Law Enforcement and by an individual processing a valid permit issued by the Department for this purpose."

In the present case, the trial court specifically noted:

> "It is interesting to note that the Statute does not specifically speak to the issue of collection, storage, or transportation of samples drawn pursuant to the Statute." (RII-312)

Respondent suggests that Rule 11D-8.012 does not adequately provide for the

preservation of blood samples. Rather, it merely indicates that the collection vial shall contain an anticoagulant substance. An anticoagulant substance is only used to keep the blood from clotting. There is no provision for the amount of anticoagulant; no provision for any preservation; and no maintenance or integrity of the sample collected. Respondent has met the burden of proving the invalidity of the implied consent rule through the undisputed testimony of experts Wood and Burr that the Rules do not require a preservative, nor any means for transportation or storage, and that the blood alcohol content of a sample absent a preservative or proper storage or maintenance can be compromised. Implied consent is a legislative creation, as is the presumption of intoxication; if the rules are inadequate to insure the integrity of the sample, then Petitioner should not be entitled to the presumption.

Petitioner argued that the "presumption" at issue is a permissive inference that is the functional equivalent of evidence of impairment, citing to State v. Rolle, 560 So.2d 1154, 1156 (Fla 1990). Petitioner also argued that this evidence of impairment is simply one fact to be considered with others, or can be one fact alone, probative enough to overcome a motion for judgment of acquittal on the element of impairment. In a concurring opinion of Justice Barkett in Rolle, in which Justice Kogan concurred, it was stated:

> "Under federal and Florida law, due process guarantees to protect a criminal defendant from conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In re, Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072,

25 L. Ed. 2d 368 (1970)."

560 So.2d at 1158.

Justice Burkett also said in Rolle that:

> "The constitutionality of an inference depends on whether there is a reasonable, logical, rational and direct relationship between the proven fact and the inferred fact. If not, the inference violates due process, for it creates the risk of an erroneous factual determination and thus excuses the prosecution from proving every element beyond a reasonable doubt. A constitutionally valid inference requires a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from the former.'"

at 1159.

The trial court found in the present case that the undisputed evidence is that the blood sample can be compromised because the Rule fails to contain provisions for preservatives, as well as for proper handling, storage, and transportation. (RII-311-313) It therefore creates the risk of an erroneous factual determination, and if so the State must prove every element beyond a reasonable doubt and it is not entitled to the inference. Petitioner's Initial Brief cites numerous other FDLE Rules, presumably in support of its position. Respondent is at a loss, however, as to how these other Rules can affect, or correct, the deficiencies which the trial court found in Rule 11D-8.012. Petitioner concludes that the trial court's order and the First DCA's affirmance "exholt form over substance." Pet. Brf. at 20. Both experts have testified that lack of a preservative in a blood sample could compromise the sample and the resulting test. (RI-102-03; II-253)

Miller v. State, 597 So.2d 767 (Fla. 1991), cited by Petitioner, addressed the issue

of whether or not the blood sample would be admissible because the State expert could not testify as to defendant's blood alcohol level at the time that he was driving. The Court indicated that this goes to the weight and not the admissibility. Id. This is different from the case, sub judice, where the trial court only indicated that Petitioner was not entitled to the benefits of Florida implied consent, but that the blood alcohol sample would be admissible upon laying the proper predicate under Robertson, 604 So.2d at 783.

Petitioner also cites Carino v. State, 635 So.2d 9 (Fla. 1994), which answered a certified question that certain rules of the Florida Administrative Code were not void for vagueness. This Court further found that the use of different forms, reflecting different monthly maintenance procedures for breath-testing equipment, is not a denial of due process. The questions were certified to the Supreme Court by the Fourth DCA in State v. Rochelle, 609 So.2d 613 (Fla. 4th DCA 1992). The Rochelle court found that the procedures for checking breathalyzer equipment and the use of different forms for periodic checking of the equipment did not result in the procedures being out of substantial compliance. The court noted that much of the extensive expert testimony taken, properly understood, showed clearly the insubstantiality of the new form's deviation from the promulgated form. Id. The new form required the equipment to be put through the same paces as the original form, but in addition provided for checking whether the machine could differentiate between acetone and grain alcohol found in the

test sample. Id. at 616. In other words, the test provided for an additional check that could be advantageous to a driver.

The Rochelle court cited State v. Berger, 605 So.2d 488 (Fla. 2nd DCA 1992), as did the Petitioner in this case. In Berger, the court concluded that the administrative scheme is sufficient to insure reliability of results although the standards set forth for monthly and annual testing are not specifically stated in the rules. Both of these cases are somewhat analogous to State v. Brigham, 694 So.2d 793, 798, (Fla. 2nd DCA 1997), which held:

> "We are not required, however, to interpret the statute 'so strictly as to emasculate the statute and defeat the obvious intention of the legislature.'"

The Court further stated,

> "This is not a statute in which the word 'percent' is ambiguous in the sense that it has two competing definitions, leaving the defendant to guess at the appropriate meaning." Id.

Brigham also involved a discussion over the readout on an intoxilyzer that had been changed from "percent" to "grams per 210 liters." Id. at 798.

Some of the challenges to the rules and statutes cited in Petitioner's brief as to testing procedures were claimed to be not only speculative and theoretical, but also hyper-technical. However, that is not the situation in the case presently before this Court. Expert witnesses, presented by both the Petitioner and Respondent, acknowledge that the Rule does not require a preservative in the vial or tube used to collect blood samples. (RI 102-03; II-253) Both acknowledged that there is nothing in the rules as to

the specific transportation, storage, or refrigeration of the sample, and that this could compromise the sample. Petitioner's expert, Wood, indicates that these are common sense principles to be followed. Defense expert, Burr, testified that the people that are generally involved in the collection, storage, and transportation of blood samples generally are not experts and that the rules are insufficient. (RII-258) The trial court heard the testimony of both sides, found that there was little inconsistency, and found that the rule was insufficient to provide due process protection: not a hyper-technical, speculative or theoretical challenge, but a challenge that goes directly to core principles of the State to insure that reliable samples are available for testing. (RII-312)

Accordingly, it is Respondent's position that neither the trial court nor the majority of the First DCA panel ignored total legislative agency constraints on the blood alcohol testing procedures. In fact, the other regulations had little affect on Rule 11D-8.012, which must stand on its own to insure a reliable sample.

B. The Petitioner Erroneously Contends that the Trial Court and the First DCA Emphasize the Weight of the Evidence (Permissive Inference) Excluded, Not Its Admissibility.

It should be noted that the trial court did not exclude the blood alcohol sample in this case. The trial court found that Petitioner was not entitled to admissibility of the blood sample under Florida's implied consent law because the statute and Rule do not provide due process protection. (RII-312) The trial court denied the Respondent's Motion to Suppress the blood test results and found that the Petitioner would be able to

establish the circumstances of preservation, storage, and transportation of the sample in compliance with Robertson v. State, 604 So.2d 783 (Fla. 1992). Under Florida's implied consent law, one is presumed to have consented to blood alcohol testing for the privilege of driving on the highways. If the statutes and rules are inadequate to insure a reliable sample, then the Petitioner should not be entitled to the benefit of Florida implied consent as to the admissibility of the blood sample, unless it is established through the proper predicate that it is reliable.

Miller v. State, 597 So.2d 767 (Fla. 1992), and State v. Bender, 382 So.3d 697 (Fla. 1980), are cited in support by the Petitioner. See Pet.Brf. at 21-22. In Miller, the court was concerned with the inability of the State's expert to "relate back" blood-alcohol evidence obtained from the defendant after he was stopped to the time the defendant was operating the vehicle. 597 So.2d at 767. The court found that this was a question of credibility and weight-of-the-evidence and not admissibility, provided the test was conducted within a reasonable time. This Court indicates in Miller:

> "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."

Id. at 769.

In the instant case, that is basically what the trial court has indicated. The Rules for the collection, storage, and transportation of blood samples are inadequate, but

admissibility continues to be subject to all other applicable precedent and evidentiary rules regarding the admissibility of evidence.

In State v. Bender, 382 So.2d at 699, this Court stated:

> "The purpose of these portions of Sections 322.261 and 322.262 which direct law enforcement to use only approved techniques and methods is to insure reliable scientific evidence for use in future court proceedings and to protect the health of those persons being tested, who by this statute have given their implied consent to these tests."

It is Respondent's position that the same language is applicable to the present §§316.1933 and 316.1934. Rule 11D-8.012 does not ensure reliable scientific evidence. Petitioner's premise is incorrect: the trial court and the First DCA did not exclude the blood sample, but indicated that the Petitioner would not have the benefit of implied consent for admissibility purposes and had to meet a standard predicate for introduction of the scientific evidence.

C. The Petitioner's Contention that the Trial Court and the DCA Erroneously Ignored the Basic Tests for a Permissive Inference, i.e., Requiring the Party Challenging it to Demonstrate its' Invalidity as Applied to Him is Erroneous.

Petitioner relies on County Court of Ulster County, New York v. Allen, 442 U.S. 140, 99 S.Ct. 2213 (1979), as to the constitutionality of a "permissive inference" as distinguished from a "mandatory presumption." Petitioner suggests in determining the constitutional validity of a permissive inference that the party challenging the inference must demonstrate its invalidity as applied to him. Petitioner has misconceived the trial

court's order. The trial court did not rule as to the constitutionality of the implied consent presumptions permitted by Section 316.1934, Fla. Stat. (1995). The trial court found that because Rule 11D-8.012 does not meet due process requirements, the Petitioner does not get the benefit of the presumption of intoxication. (RII-312-13) The trial court did not find that the implied consent "presumption of intoxication" is unconstitutional. The court found that it is inapplicable to the Respondent because the rule implementing collection, storage, and transportation of the blood sample is inadequate to ensure a reliable sample. The court found that the rule did not meet due process requirements to ensure reliability. Id. The trial court said that Petitioner is not entitled to the presumption; to the contrary, the First DCA found that if the Petitioner establishes through the traditional predicate that the blood sample in this case is reliable, then Petitioner is entitled to the presumption. (See Appendix A) Respondent disagrees for the reasons set forth, supra.

D. State v. Bender is controlling on the issue certified to this court.

Respondent has previously submitted argument in this brief on the issue of State v. Bender, 382 So.2d at 697. Respondent submits that State v. Bender is controlling on this issue. Petitioner and Respondent do not, however, agree on what it controls. Respondent submits that Petitioner is not entitled to the benefit of the "presumption of intoxication." "None of the statutory presumptions can apply in the absence of compliance with the administrative rules." Bender, 382 So.2d at 700. If the Rules are

defective and deny due process of law, then compliance with ineffective rules should not entitle the State to the benefit of the statutorily created presumption. Again, Bender dealt with rules promulgated for preventative maintenance checks. 382 So.2d at 697. The court found that the rules required the preventative maintenance checks to be in accordance with the procedures set forth by the manufacturer. Id. What was attacked there is the failure to attach and file those procedures with the Secretary of State. There was no showing that the manufacturer's operating manuals were unavailable. Id. at 700. In the case before this Court, the Rules did not require a preservative in the vial or tube. Again, the testimony is undisputed that the lack of a preservative could compromise a sample. Bender is different factually from the case, sub judice. However, this Court noted as stated above that none of the statutory presumptions apply without compliance.

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?

This issue has been addressed by the Respondent, supra beginning at page 5.

CONCLUSION

Based upon the foregoing, the Respondent respectfully submits that the certified question should be answered in the negative. Respondent submits that this Court should affirm the trial court's order.

Respectfully submitted,

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BARRY W. BEROSET
Beroset & Keene
417 East Zaragoza Street
Pensacola, Florida 32501
Phone: (850) 438-3111
Florida Bar No.: 145143
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to Stephen R. White, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on this the _____ day of July, 1999.

_____

BARRY W. BEROSET
Beroset & Keene
417 East Zaragoza Street
Pensacola, Florida 32501
Phone: (850) 438-3111
Florida Bar No.: 145143
Attorney for Respondent