IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL RANDY MILES,

Respondent.

CASE NO. 95,490

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In addition to using the same referencing symbols and supplied bold lettering indicated in Petitioner's Initial Brief on the Merits, "IB" and "AB" will designate Petitioner's Initial Brief and Respondent's Answer Brief, respectively, followed by any appropriate page number.

ARGUMENT
CERTIFIED QUESTION

> 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?

Respondent's Answer Brief fails to point to evidence of **a single real-world instance — not even one** — in Florida where any omission in the coverage of Section 316.1933/Rule 11D-8.011-8.017 resulted in an unreliable blood alcohol result. Instead, with the repeated invocation of "could compromise" (AB 5, 8, 12, 14, 19) and "can be compromised" (AB 5, 12), he wishes to ground striking down a regulatory body of law based upon **speculated** possibility. As it emphasized in its Initial Brief (IB 12-13, 23-24), the State respectfully submits that due process requires only a rational nexus between the predicate-evidence (here, a blood alcohol result of .10) and the resulting permissive inference (here, of impairment) **in Respondent's case**, not a theoretical ideal that has no bearing on any actual problems in any **actual Florida cases**. One might theorize countless factors

or events that **could** corrupt a blood sample (e.g., placing it on or near a space heater or in a microwave oven), but due process does not require rule-coverage of such "risks." Contrary to Respondent's invocation of "risk" (AB 12), theoretical "risk," divorced from any showing of any impact on actual cases, especially Respondent's case, are not the "stuff" of due process.

Stating the problem rhetorically, with the indulgence of the Court: What part of due process is offended where, as here, the opponent of the permissive inference has failed to show **any actual case whatsoever**, **including his own**, that has been affected in any way by argued imperfection(s) in the statutes/rules? Thus, Respondent's Answer brief has not disputed the State's assertion that he has not produced evidence of any "**specific unreliable blood alcohol results in Florida due to a lack of rules**" (IB 19-20 bold in original). On this basis, the trial court failed to conduct the correct analysis, and, as a matter of law, erred in excluding the permissive inference, sub nomine statutory "presumption."

Accordingly, rules that would cover matters that theoretically could cover matters, but dehors any real-world practice affecting the reliability of any blood alcohol result whatsoever, cannot be a matter of "core policies" (II 312) or "core principles" (AB 8, 15) of underlying statutes, which, quite to the contrary, explicitly recognize real-world practice in mandating only "**substantial**" compliance, See §316.1932(1)(f)1 , Fla. Stat. ("**substantially** in accordance with"); §316.1933(2)(b), Fla. Stat. ("**substantially** in accordance with") §316.1933(2)(b), Fla.

Stat. ("Any **insubstantial** differences ...");; §316.1934(3) ("**substantially** in accordance with"; "Any **insubstantial** differences ...") (cited at IB 20).

Thus, Respondent's Louisiana case (quoted at AB 6-7), State v. Tanner, 457 So.2d 1172 (La. 1984) ("breath analysis test performed ... November 8, 1980"), which discusses "**strict**[]" compliance, is inapplicable. Moreover, in Tanner, "the state did not offer any additional evidence to establish that, despite the lack of adequate maintenance regulations, the machine's result was nonetheless accurate," 457 So.2d at 1176, whereas here, the defense counsel objected to State's evidence of the reliability of this blood alcohol test result as irrelevant (See I 113, 116), and, in spite of this defense effort, there was significant evidence indicating the blood test result as reliable (See IB 25-26). Further, Tanner concerned the inner workings of a machine, i.e., "the 'known alcohol standard' used to calibrate the auto-intoximeter"; the calibration of the machine that produces the numerical result obviously affected that result **in each and every test**; in contrast, here heat, etc **MIGHT** affect a result if and only if the aberration is excessive.

In Florida, reading "substantial compliance" in pari materia with the totality of the repeated enhancements of DUI penalties, See §316.193, Fla. Stat. (penalty section, History) (cited at IB 20), indicates that the legislature did not intend for an absurd result of impeding countless prosecutions because of a matter that has not been shown to have any bearing whatsoever upon the reliability of a single actual blood alcohol result. The trial

court erred in constructing due process out of purported "core policy" (See II 311-12, IB Appendix B) ungrounded upon actual problems.

Thus, contrary to Respondent's assertion (AB 7-8), there was no evidence that properly could have supported the trial court's ruling, and, therefore, the credibility of evidence has no bearing upon the matter. Instead, he points only to **legal conclusions** of an expert concerning whether certain matters **should be** in the rules (See AB 15), which is a matter, due to statutory deference to agency expertise, within the original and legitimate province of FDLE. See citations of Pan American World Airways, Inc. v. Florida Public Service Com'n, 427 So.2d 716 (Fla. 1983), and accompanying discussions at IB 11, 17, 25, 27-28).

Put another way, there was no dispute among the testifying experts concerning any **pertinent** underlying **facts**. Therefore, there was no **pertinent** factual basis for the trial court to second-guess the agency's decisions.

Respondent's position (AB 8), which proposes a clearly-erroneous test for the trial court's second-guessing the statutorily designated agency, erroneously shifts the presumption to the trial court in its ruling against FDLE rules. Respondent's position thereby essentially guts the function of the agency having the expertise in a given area, here, to balance the real-world need, based on actual practice, to promulgate rules regulating aspects of blood sample preservation against the burden that additional regulation would impose on law

enforcement. Here, the agency's expertise is especially significant, as FDLE has designated duties on both sides of the balance: blood alcohol testing, See §316.1933(2)(b), Fla. Stat., and training standards for officers, See §943.11(1)a), Fla. Stat. and §943.12, Fla. Stat. (cited at IB 17-18 and entirely ignored in Respondent's brief).

In other words, Respondent's position would erroneously supplant the legislatively designated agency with a circuit court judge as the primary[1] finder of what is needed. Such a position violates the legitimate provinces of the legislature and its designated agency of expertise. Thus, this Court has recognized otherwise appropriate deference to an agency even where, **unlike here**, a **specific** instance of an unsatisfactory outcome has been alleged, See, e.g., City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985) (analysis of sovereign immunity in tort litigation; alleged "clear lack of proper decision-making and supervisory skills, which failure []as the proximate cause of the destruction of Palmer's office equipment, library, and professional records"; "decisions of how to properly fight a particular fire, how to rescue victims in a fire, or what and how much equipment to send to a fire, are discretionary judgmental decisions which are inherent in this public safety function of

[1] The State is not claiming that the agency's function is beyond all judicial review but that proper judicial review requires the party challenging the agency's decision(s) to tender a proper showing, which is not present here. In other words, the presumption of correctness resides in the agency's decision, and it controls until such a showing is made.

fire protection"; violation of separation of powers for judicial branch to "second-guess" firefighter decisions); Wong v. City of Miami, 237 So.2d 132, 133-34 (Fla. 1970) (mayor's order of removal of police officers stationed in area allegedly causing "damage in excess of $100,000.00"; "inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers"; causal link between mayor's decision and damages speculative). A fortiori, here there has been no allegation and no showing of **any specific** unsatisfactory outcome.

Respondent (See AB 4, 9) feels it important that the State submitted for this Court's consideration a restated certified question, bifurcated into two issues, and that the State then devoted little formal coverage in its Initial Brief to the discussion of the certified question per se.[2] The State respectfully submits that the problem with the certified question, and the DCA decision affirming the trial court's ruling on which it is based, is that they both necessarily assume, sans proper analysis, that the pertinent rules and statutes are unconstitutionally deficient and that this assumption is of great public importance impacting countless prosecutions statewide. The bifurcation of the certified question into two issues merely clarified the crucial first prong of the analysis, i.e., the alleged deficiency in the rules, on which the certified question was based. It is well-settled that restating a certified question

[2] Also, see ISSUE II infra.

is appropriate where it does not clearly state the matter under review. See, e.g., State v. Hickson, 630 So.2d 172 (Fla. 1993) (quashed DCA decision; "After studying this issue, we restate the question as follows ***"; certified question, couched in terms of defendant's constitutional right, rephrased in general terms, and opinion reasoned, in part, "protects the rights and interests of both the defendant and the state"); Alvarez v. Board of Trustees of City Pension Fund for Firefighters and Police Officers in City of Tampa, 580 So.2d 151 (Fla. 1991) (quashed DCA decision; additional conflicting statute added to certified question); Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990) ("answer the question as restated below in the affirmative" and quash the DCA's decision).

Here, as in Thomason v. State, 620 So.2d 1234, 1235 (Fla. 1993) (quashed "**decision**" of DCA), the State requests that the certified question be "restate[d] ... in conformity with the facts of this case." Here, as in Godwin v. State, 593 So.2d 211 (Fla. 1992) (mootness), a rephrased certified question would clarify the actual nature of the DCA decision: there, whether the action was moot; here, whether the FDLE fatally deficient. See also Riley v. State, 511 So.2d 282 (Fla. 1987), on merits vacated and remanded Riley v. State, 549 So.2d 673 (Fla. 1989) (rephrased a certified question because, as the DCA wrote it, did not comport with "established search-and-seizure analysis").

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?

Respondent attempts to summarily dismiss the State's as-applied analysis (See IB 22-27) by arguing (AB 18) that the trial court found that the permissive inference "is inapplicable to Respondent because the rule implementing collection, storage, and transportation of the blood sample is inadequate to ensure a reliable sample." This begs the real question of how the rules [**and** statutes **and** evidentiary principles, See IB 13-16] are so deficient that they violate due process. What is so unfair and so unreliable at the level of unconstitutionality where Respondent failed to allege and adduce evidence of **any** actual blood test results? What is so unfair and so unreliable at the level of unconstitutionality where "STANDARD RULES OF EVIDENCE concerning the preservation and transportation of evidence" (discussed at IB 15-16) shore up any purported facial omissions in the pertinent and otherwise extensive statutes and rules (summarized IB 13-15) and where the pertinent statute expressly incorporates general rules of evidentiary admissibility, See §316.1934(2), Fla. Stat. ("otherwise admissible")?

The State has argued at length supra and in its Initial Brief that the record of this case fails to support the trial court's declaration of pertinent blood alcohol statutes/rules as inadequate at the level of a due process violation. In Respondent's words, "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**" (AB 91-10). It should have. The trial court's erroneous failure to conduct a proper hearing was integral to its erroneous failure to conduct the proper analysis. A proper analysis does not rely upon purely **speculative possibilities**. Cf. Travis v. State, 700 So.2d 104, 105-106 (Fla. 1st DCA 1997)[3] ("entertain[ing] countless hypothetical situations" inappropriate in analyzing challenge to substantive criminal statute on ground of vagueness, unless first amendment implicated) citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

Indeed, here Respondent affirmatively attempted to preclude any consideration of facts of this case pertaining to reliability of his blood alcohol test result. (See I 113, 116) Here, the trial court's error went yet a step further: The trial court focused on NO case whatsoever, i..e., it failed to require any showing of any regulatory deficiency having any impact on the reliability of any actual blood alcohol test. If due process is implicated at all, the absence of any such showing violates it. See discussion of permissive inference of non-impairment in ISSUE II infra.

Because Respondent failed to adduce any evidence of concrete cases of unreliable blood alcohol test results in Florida, including his own, it is undisputed that any omissions in the

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[3] Rev. denied 707 So.2d 1128 (Fla. 1998).

Rules at issue have not generally presented a problem in Florida. FDLE has, in its discretion, has chosen to avoid a "monster" set of rules that cover theoretical possibilities. (See I 87-90)[4]

Accordingly, Respondent's discussion (AB 17) of State v. Bender, 382 So.2d 697 (Fla. 1980), quotes a general principle from it but totally ignores its **holding** (discussed at IB 27-28). Respondent's brief (AB 15-16) is devoid of any discussion of the matters in Bender that, on their face, bore upon reliability of test results, yet were not required in the rules as a matter of due process. For the reasons discussed in the State's Initial Brief, Bender controls and comports with a substantial body of other case law (as discussed at IB 10, 27-28). Respondent's Answer Brief has chosen to ignore dissenting Judge Wolf's analysis of Bender just as the DCA majority did below.

Respondent also continues to ignore a significant portion of Bender when he argues (at AB 17-18), as the DCA-majority also erroneously held, that the burden is on the proponent of the permissive inference (here, the State) to establish the reliability of the blood alcohol test result. Instead, Bender,

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[4] The State's position is not that law enforcement's handling of evidence is 100% flawless in **every** case for **all** types of evidence, but if such errors were at any magnitude that truly matters in the real world of blood preservation and transportation, Respondents' excellent counsel would have brought examples of such errors to the forefront of the record. Instead, Respondent resorted to an out-of-state expert who had not reviewed Florida statutes on the subject (See II 270) and who might have read pertinent Florida statutes "once upon a time" (II 272). Even more importantly, there was not a shred of evidence that Respondent's blood alcohol test result was unreliable (See IB 25-26).

382 So.2d at 699, indicated that once the pertinent statute and rules are satisfied, the evidence is admissible and the presumption applicable, but the opponent can rebut the presumption and "attack the reliability of the testing procedures." See also U.S. v. Brannon, 146 F.3d 1194 (9th Cir. 1998) (IB 22); Robertson v. State, 604 So.2d 783, 789 n. 6 (Fla. 1992) (IB 22); State v. Rolle, 560 So.2d 1154, 1156 (Fla. 1990), and County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) (IB 23); discussion at IB 23-25. In providing that, in any specific case, the statute and the rule may be satisfied yet there may be evidence of unreliability, Bender necessarily acknowledged that the statute and rules do not cover every factor that may bear upon reliability, yet, such a gap does not per se render the permissive inference inapplicable. Most importantly, Bender's analysis focused on reliability of the blood alcohol test in the individual case, rather than speculative possibilities.

In sum, the State respectfully submits that Respondent would erroneously isolate

- FDLE's background and expertise from the rules it promulgates, totally ignoring the former and the legislature's recognition of it;
- each facet of the rules from every other facet of them bearing upon reliability;
- the rules from pertinent statutory provisions and from pertinent general rules of evidence;

- the analysis from facts in any case, i.e., from a determination of whether any supposed gaps in the rules have had any impact on the reliability of any actual blood alcohol test results;
- the analysis from the facts in Respondent's case, i.e., from a determination of whether any supposed gaps in the rules had any impact on the reliability of the blood alcohol test results in Respondent's case;
- the analysis of the certified question from a substantial body of case law that controls.

These are major points of departure between the parties' respective positions.

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?

Respondent (AB 4, 9) mistakenly accuses the State of slighting ISSUE II and thereby slighting the certified question, as the DCA majority phrased it. The State's formal treatment of ISSUE II (IB 28-29) is grounded upon, and an extension of, its analyses in ISSUE I (IB 12-28), i.e., the totality of assurances of reliability in the composite of statutes and FDLE rules, as buttressed by standard principles of evidence, and the nature of the permissive inference. In response to Respondent's accusation,

the State's discussion now returns to addressing the certified question as DCA majority phrased it.

There are two ways to view the DCA-majority's certified question, as the DCA majority phrased it. First, simply viewing the question on its face, without regard to what it assumes and without regard to DCA-majority's affirmance of the trial court's ruling, the State contends that "yes" is the correct answer as a matter of law. Given the existing regimen of statutes and FDLE rules, with the additional statutorily cross-referenced reliability-assurances of standard evidentiary principles, See ISSUE I, the State's proof of any of the three-pronged test would be unnecessary and therefore a gratuity unless and until the opponent of the permissive inference, here, the defendant, properly alleges, and produces prima facie evidence of, unreliability in his case.

Second, viewing the certified question as informed by the DCA's affirmance of the trial court's exclusion of the permissive inference, it assumes that

a. the totality of the regimen of statutes and FDLE rules and general principles of evidence are insufficient to assure reliability and that therefore

b. the State's production of evidence of compliance with that regimen would be insufficient to assure a requisite threshold of reliability.

"a" and "b" are precisely the matters discussed under CERTIFIED QUESTION and ISSUE I above as well as at length in the State's Initial Brief.

Moreover, as the State pointed out in its Initial Brief (IB 26-27), the DCA majority's decision is grounded upon supposed deficiencies pertaining only to reliability, yet the DCA would require the proponent of the permissive inference also to prove the two prongs that do not directly concern reliability. In this sense, the DCA's three-prong requirement is not rationally connected to the underlying problem that it purportedly addresses.

Further, as the State has indicated (IB 26-27, 28 last full paragraph), the permissive inference not only can benefit the State but also can benefit a defendant, where the result is .05 or less. In this sense, **the DCA's three-prong requirement would be violative of the due-process rights of a defendant-proponent of the permissive inference, who would have otherwise been entitled to the permissive inference of non-impairment**. The State has not found in Respondent's Answer Brief where he addresses this serious problem in the DCA-majority's opinion of the mismatch between the single-prong "problem" and the three-prong "remedy."

CONCLUSION

Based on the foregoing discussion and the Initial Brief, 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 under the conditions specified in the State's Initial Brief (IB 29-30 CONCLUSION).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. Mail to Barry W. Beroset, Esq., Beroset & Keene, 417 East Zaragoza St., Pensacola, FL 32501, this 22d day of July, 1999.

_____
Stephen R. White
Attorney for the State of Florida

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