IN THE SUPREME COURT OF FLORIDA



DEAN A. TOWNSEND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC99-28

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

# RESPONDENT'S BRIEF ON THE MERITS

**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**

**ROBERT J. KRAUSS**
**Senior Assistant Attorney General**
**Chief of Criminal Law, Tampa**
Florida Bar No. 238538

**SUSAN D. DUNLEVY**
**Assistant Attorney General**
Florida Bar No. 229032
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2367
(813) 873-4739

COUNSEL FOR RESPONDENT

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## STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information filed on October 5, 1995 with DUI manslaughter, in violation of Section 316.193(3)(c)3, Florida Statutes (1995), vehicular homicide, in violation of Section 782.071, Florida Statutes (1995), and two counts of DUI with serious bodily injury, in violation of Section 316.193(3)(c)2, Florida Statutes (1995); the offenses were alleged to have occurred on August 6, 1995, and the victim in the first two counts was the same person (V 1 R 1-4). On April 13, 1998, Petitioner filed a motion to suppress or exclude his blood alcohol test results because the FDLE regulations governing testing were inadequate (V 1 R 79-87); attached to the motion were, inter alia, a similar motion from another case, State v. *Guth, No.* CJAP 96-75 (Fla. 9th Cir. Ct. Mar. 24, 1998), the trial court's order ruling on the motion, the circuit court's opinion on appeal, and the transcript of the testimony of Thomas M. Wood, a senior crime lab analyst with FDLE, at the hearing on the motion (V 1 R 92-111, V 2 R 328 - V 3 R 394).

**At the hearing in *Guth,*** which was held on September 9, 1996 (V ***2*** R 232) , **Wood testified** that, prior to the Florida Supreme Court's decision in *Mehl* v. State, 632 So. 2d 593 (Fla. 1993), the Administrative Code rule pertaining to blood alcohol analysis was fairly short and simply required that the analytical procedure used by

anyone and the theory behind it be submitted to the Implied Consent Program (V 2 R *330-331).* The FDLE's response to the *Mehl* decision was to promulgate the current rule on April 1, 1994 (V 2 R 331-*332).* A proposed amendment of Rule 11D-8.013, Florida Administrative Code, was filed on January 12, 1994 and published in the Florida Administrative Weekly on January 21, 1994 (V 2 R 333, 335-*336,* V 3 R 345). Proposed Rule 11D-8.013(1)(e)2b required that instrument calibration be performed and/or validated prior to analysis of each sample or group of samples and that each such validation include a minimum of 2 alcohol standard draw controls, one at 0.05 gram per 100 milliliters (g/100 ml) of alcohol and one at 0.20 g/100 ml or higher (V 3 R 344-345). Proposed Rule 8.013(1)(e)2c required that the concentration range for the calibration include 0.01 g/100 ml through at least 0.25 g/100 ml (V 3 R 345). The hearing on the proposed rule changes took place on February 14, 1994 (V 3 R 346-347). Changes were then made to the proposed rule, and the notice of the changes was published in the March 4, 1994 issue of the Florida Administrative Weekly (V 3 R 350). One of the changes was that Rule 11D-8.013(1)(e)2c was amended to provide that the concentration range for the calibration had to include a calibrator less than 0.04 *g/100 ml* alcohol and another calibrator greater than 0.20 *g/ml* alcohol (V 3 R 351). This latter was a mistake; the denominators on both of those fractions should have been 100 ml rather than 1 ml (V 3 R 351-352, 354-355, 358-359). The governor and cabinet approved the amended rule on March 8,

*1994,* and it became effective April 1, 1994 (V 3 R 352-353). Wood did not become aware of the error until August 10, 1995; *no one had submitted an analytical procedure using a calibrator at .20 g/ml* (V **3** R **382-383, 387).** The Secretary of State determined that the .20 g/ml was a typographical error and wrote a letter to that effect in October of 1995 (V 3 R 389). The rule was republished with the error corrected in November of 1995 (V 3 R 388-389). Rule 11D-8.002(12) requires that blood alcohol level be reported as grams of alcohol per 100 milliliters of blood, and Rule 11D-8.013(1)(e) 2c provides that the calibration curve "validation must include a minimum of two alcohol standards or controls; one at 0.05 grams per 100 milliliters of alcohol or lower, and one at 0.20 grams per 100 ml of alcohol or higher" (V 3 R 356-358). A procedure with a calibration curve valid below 0.04 g/100 ml and above .20 g/100 ml would **be** in compliance with the rule (V 3 R 363). Rule 11D-8.012 requires that the subject's name, the date and time of collection of a blood sample, and the initials of the person who collected the blood be on the blood tubes; that a nonalcoholic antiseptic swab be used to clean the site from which the blood is drawn; that the blood tube be capped; and that the blood tube contain an anticoagulant (V 3 R 363-364). Compliance with these requirements would preserve the integrity of a blood sample (V 3 R 364). Long ago, the rule also required that the blood tubes also contain a preservative; Wood did not know why the requirement of a preservative had been omitted from the revised rule, but that omission did not

amount to prohibition of the use of a preservative and, in practice, he would expect a preservative to be used (V 3 R 364-365, 390). A preservative would either destroy any microbe present in a blood sample or prevent it from multiplying or consuming the alcohol in the sample and thereby slow, but not stop, the deterioration of the blood sample (V 3 R 366, 392). Refrigeration can substitute for a preservative, although it will only slow the microbe's growth rate (V 3 R 365-366, 391). A blood sample with a preservative or a sample that was refrigerated would last longer than a sample without a preservative that was not refrigerated, but the latter "wouldn't instantly self-destruct" (V 3 R 390-392). Whether blood alcohol testing of a given blood sample would be reliable would depend on the length of time between the collection of the blood and the analysis "and the history of the sample," and this would be true whether or not the blood tube contained a preservative or was refrigerated after collection of the blood sample (V 3 R 392). The anticoagulant should prevent blood clots from forming in the sample (V 3 R 368). Wood had heard of microclots, which are supposedly not visible to the naked eye (V 3 R 369). If a blood sample contained a clot that the analyst did not see, the analyst might not draw the complete volume needed for testing from the blood sample, which "would cause the alcohol reading to be low compared to one that was fully drawn up"; Wood knew of no way that the presence of a blood clot could cause the blood alcohol test result to be higher than it should be (V 3 R 369). Wood believed

that Rule 11D-8.012 was adequate (V 3 R 375).

**At the hearing on Petitioner's motion in the instant case,** held on November 23, 1998, Dr. Edward N. Willey, a pathologist and former medical examiner, was accepted as an expert witness to testify on behalf of Petitioner over the State's objection (V 3 R 430, 433, 436). He testified that the FDLE rules regarding blood alcohol testing were scientifically inadequate to ensure a reliable result (V 3 R 436). The rule should specify one or more approved anticoagulants and the amount of anticoagulant to be used for a specific quantity of blood to be drawn (V 3 R 437). Microclots can occur in large number, suspended in otherwise whole blood, and may be overlooked (V 3 R 438). If the portion of the blood which is relatively rich in serum is tested, the resulting blood alcohol level (BAL) will be high in comparison with the level in whole blood, whereas, if the portion of blood which is relatively rich in clot is tested, the resulting BAL will be artificially low (V 3 R 439). If the tube in which the blood sample is collected contains an anticoagulant, but in an insufficient quantity, some clotting will occur (V 3 R 439). Clotting will also occur if the tube is not sufficiently agitated, as by inverting it a number of times, which is standard procedure, so that the blood and the anticoagulant are not intermixed properly (V 3 R 439-440). The rule does not mention the need for intermixing the anticoagulant with the blood (V 3 R 440). It would be appropriate for the rule to include a requirement that the tube be agitated (V 3 R 440). The most

common anticoagulant "used in the trade" is potassium oxalate (V 3 R 479). A preservative is added to blood to prevent the enzymatic creation or destruction of alcohol; the most commonly used preservative is 1% sodium fluoride (V 3 R 441). The preservative inactivates the enzymes that produce or destroy alcohol and impedes the growth and functions of microorganisms, making it much less likely that any contamination will alter the result of the testing for BAL (V 3 R 446). Like the anticoagulant, the preservative must be intermixed with the blood (V 3 R 446-447). In the **absence** of a preservative, it is possible to have an increased amount of alcohol present due to contamination with microorganisms capable of creating ethyl alcohol or to have a reduced amount of alcohol present due to the presence of organisms that remove alcohol or hemoglobin that is oxygenated (V 3 R 441). Organisms that produce ethanol do so by destroying glucose that is normally present in blood; the more glucose that is present, the greater the alcohol production that may occur (V 3 R 442). Contamination can occur if the blood tube used is not sterile, and the regulations do not require that sterile tubes be used (V 3 R 443). Contamination can also occur if the tube's vacuum is broken, allowing ambient air and material around the edge of the stopper to rush into the tube (V 3 R 443, 445). Additionally, contamination can result from skin that has not been properly disinfected (V 3 R 444). The rules are also inadequate in failing to specify the temperature at which blood samples are to be stored; "[r]efrigeration should be specified

wherever possible, and it should not be subjected to very high temperatures for any significant length of time under any circumstances" (V 3 R 449). The storage interval should also be specified because the rules should be more restrictive if a long storage interval, i.e., one or more years as opposed to 30-60 days, is contemplated (V 3 R 449). The higher the temperature, the more likely organisms are to grow and the faster they will grow (V 3 R 449-450). Moreover, oxygenated hemoglobin at high temperatures over a long period of time will destroy alcohol (V 3 R 450). The most expeditious way to promulgate effective rules would be to establish approved kits and supply them to the various agencies and people who do blood draws for BAL testing (V 3 R 451). The rules should specify a limited number of suppliers of blood tubes for BAL testing and include policies regarding drawing two blood specimens in tandem; how the blood is to be drawn, identified, and maintained thereafter; how and when it is to be submitted to a lab for testing; how it is to be preserved in the lab; whether it is to be accessible to other people subsequently; and how long it will be available (V 3 R 451-453). The rules should require that a blood sample be labeled immediately after it is collected, not beforehand (V 3 R 452-453).

On cross-examination, Willey admitted that all vacutainer tubes used for blood draws are, or should be, sterile when manufactured (V 3 R 457). The materials used to clean the skin surface at the site from which a blood sample is drawn are also generally

assumed to be sterile (V 3 R 457-458). The serum alcohol level can be up to almost 1½ times the BAL, which is based on whole blood, but the "common median" or average is around 1.16 times the BAL (V 3 R 459-460). Willey admitted that he had not considered the requirements concerning who is permitted to draw blood and the training all such phlebotomists must have in formulating his opinion regarding the adequacy of the rules in question (V 3 R 460-462). He also was unfamiliar with *any* of the blood kits used in Florida to draw blood for BAL testing purposes (V 3 R 462, 464). Willey admitted that it is very unusual for alcohol produced by organisms in the blood to be found in blood drawn from a living person (as opposed to blood drawn from a cadaver during autopsy), and he was unaware of any studies showing alcohol production by organisms in blood drawn from a living person (V 3 R 465, 474).

Richard E. Jensen, Ph. D., an analytical chemist, also testified on behalf of Petitioner (V 3 R 481-482). He had worked in the crime lab for the state of Minnesota from 1979 to April 1984, supervising the alcohol testing section (V 3 R 483-484). He then joined for a few months a private lab in Colorado that did forensic toxicology, analyzing human physiological samples for alcohol and drug content, for the Colorado Highway Patrol and other law enforcement agencies (V 3 R 484-485). In late 1984, Jensen formed his own company, Forensic Associates, Inc., and had served as its director of forensic toxicology since then (V 3 R 485). Jensen opined that the administrative code rules in question were "wholly

inadequate as it relates to the criteria of both accuracy and reliability in blood alcohol testing" (V 3 R 488). His further testimony was consistent with Willey's testimony (V 3 R 489-550). In Jensen's experience, yeasts are the biggest problem if present in blood (V 3 R 494). The blood tube can be contaminated from the air, from introduction of a contaminated piece of equipment into the tube, or by collection materials that are not sterile (V 3 R 495). A tube containing an anticoagulant and/or preservative must be tilted slowly a number of times, not shaken vigorously, to dissolve the salts of which the anticoagulant and preservative consist and distribute them homogeneously throughout the sample (V 3 R 496). Jensen related a case in which a phlebotomist at Highlands Regional Hospital in Sebring swabbed with alcohol the arm from which a blood sample was taken, and a BAL of .217 was obtained; repetition of the test within 70 minutes at Tampa General Hospital produced a BAL of 0 (V 3 R 498, 511-512). Jensen also described research he had done to determine whether purportedly nonalcoholic swabs contained alcohol; he found a certain brand of benzalkonium chloride manufactured by Zeffrin, which was used by the states of Wisconsin and North Dakota, which contained ethanol (V 3 R 499). The manufacturer had not been aware of this, but its suppliers acknowledged that the inert ingredients included ethanol (V 3 R 499-500). Jensen also related having asked the head of a hospital lab in Knoxville, Tennessee to show him the Betadine (iodine) swab that they used and being handed a swab containing tincture of io-

dine, which was 47% ethanol (V 4 R 528). Use of standardized kits would, inter alia, allow an ongoing quality control testing program to make sure that the antiseptic swabs used contained no ethanol (V 3 R 501). Such ongoing testing is not uncommon in state programs; in Minnesota, Jensen would test 1% of each batch of kits delivered, and if the tested kits failed the tests, that batch was not disseminated to its intended users (V 3 R 501-504). Differing amounts of anticoagulant and preservative in blood samples will also give different results when the samples are tested by head space gas chromatography, the method that is typically used in Florida (V 3 R 503). Jensen believed that more than half of the states use standardized kits (V 3 R 504). Additionally, biological specimens should be refrigerated at 2-8° Centigrade until they are tested, and they should be preserved in a freezer after testing in case further analysis is needed or desired (V 3 R 505-506). As for the testing procedures, "there's some uniformity, but...in terms of the individual procedures there is no uniformity" (V 3 R 507). For gas chromatographs,

> there should be a standardization as to how many standards are measured to prove that the device is operating properly, and there should be a standard specified as to how close those measurements must agree.
>
> ...Secondly, there should be a minimum of two tests conducted on the blood sample, which is inferred in most procedures that I've seen in this state, but there's no rule requiring it. There could be a single test, and with a single test you cannot ensure...scientific reliability.

(V 3 R 507-508)

The BAL test in the instant case was performed at approximately 3:00 a.m. on August 26, 1995 (V 4 R 513).

On cross-examination, Jensen admitted that his lab was able to store blood bank blood samples, which contained an anticoagulant (citrate) but no preservative, at room temperature for up to 300 days with only "a slight loss" (V 4 R 517, 537-539, 546-547).

> THE COURT: Is that because it was less than zero degrees in Minnesota?
>
> THE WITNESS: That's an excellent point, but it was room temperature, and we still heat the rooms in Minnesota.

(V 4 R 517)

He conceded that the Minnesota rules do not contain a maximum permissible lapse of time between collection and analysis of a blood sample (V 4 R 545). He further conceded that most gray-topped tubes [the type used for BAL testing] are sterilized—Becton Dickinson tubes are sterilized by gamma radiation (V 4 R 518). He would assume that a gray-top tube had an anticoagulant and a preservative, although such tubes may not all have the same anticoagulant or the same preservative (V 4 R 520). To the best of his knowledge, the scientific criteria used by analysts in the various FDLE labs are often different in terms of how close two test results must be or how close a reading must be to the standard (V 4 R 521-522). He had not seen any problems caused by these variations, but he had looked only at the procedures, not on any analy-

ses (V 4 R 521-522). If blood serum rather than whole blood is tested, the alcohol reading is approximately 15% higher on average (V 4 R 525-526). The variation in the difference is primarily a function of the hematocrit, or the amount of blood solids, in the blood sample (V 4 R 526). Testing only the blood serum rather than whole blood would solve the problem engendered by the possibility of the existence of microclots in the blood sample (V 4 R 526-527).

Wood's testimony in the *Guth* case was adm tted in evidence as former testimony at defense counsel's request (V 4 R 553-556).

Teri Stockham, M.D., who was stipulated to be an expert in toxicology (V 4 R 559), testified on behalf of the State. She had been chief toxicologist for the Broward County Medical Examiner's Office for 7 years, from 1991-1996, during which time that office did all the DUI BAL analysis, but she was currently in private practice (V 4 R 562-563). She had actual personal experience in using the vacutainer tubes or venostat containers used to draw blood samples for BAL analysis, and, in her experience, these tubes contain an anticoagulant and a preservative (V 4 R 563). She had never experienced a DUI specimen that was either contaminated or coagulated (V 4 R 564). Broward County used blood kits from two different manufacturers, one of which was Becton Dickinson (V 4 R 565). Before blood is drawn into one of the blood tubes used for DUI samples, the preservative powder in it can be seen (V 4 R 565). Once the blood specimen is inside the tube, an observer can tell by looking at it whether OK not it is coagulated, and, if not, can

safely assume that the tube contains an anticoagulant (V 4 R 565). Stockham had no concerns about the failure of the rules to specify the amount of coagulant a blood tube must contain because "the amount that the manufacturers have placed in there are sufficient and I've never come across a specimen that was clotted due to lack of proper amount of anticoagulant" (V 4 R 565-566). The only clotted specimens she had seen were post-mortem blood, which is not in good condition (V 4 R 567). If her lab were to receive a specimen containing coagulated blood, they would not accept it for testing (V 4 R 567). In Stockham's opinion, the lack of a preservative in a blood tube would not cause a problem (V 4 R 568). She had seen cases involving a decomposed body in which alcohol was detected in the blood due to post-mortem production by bacteria, but such post-mortem production is typically less than .08 gram percent alcohol and would never exceed .20 (V 4 R 569-570). A Betadine swab is commonly used when collecting blood for BAL testing (V 4 R 570). Betadine does not usually contain alcohol, and Stockham had never had any experience involving a Betadine swab containing alcohol (V 4 R 570-571). Use of a swab containing alcohol would not have a large effect on the test results (V 4 R 571). The rules do require that each blood specimen be tested twice and that the results be within .010 gram percent of each other (V 4 R 573-574). Stockham had no experience that would suggest that microclots are a real phenomenon, but, if they do exist, "if the sample is homogeneously mixed, then it wouldn't have an effect; and if the clots are that

minuscule, then, again, the change in blood alcohol [level] would be minuscule also" (V 4 R 575-576). The ratio of serum alcohol level to BAL is within a range of 1.09-1.18, with an average of about 1.14 (V 4 R 576). A rule requiring agitation of the blood tube after the blood is drawn is unnecessary because a trained phlebotomist draws the blood, and it is standard procedure for them to mix the sample as described (V 4 R 577-578). Additionally, if the blood had not been mixed properly, coagulation of the blood would be observable on visual inspection prior to analysis (V 4 R 578). The following also occurred during Stockham's testimony:

> Q. Now, do you have an opinion as to why there are vastly more rules involving breath testing than there is blood testing?
>
> A. Yes.
>
> Q. What is that, and why?
>
> * * *
>
> THE COURT: Isn't the whole point that blood testing is done in laboratories with trained people and expensive scientific equipment and their professionalism is built into the concepts, when breath testing is done by folks in police stations that need more guidance? Isn't that the obvious answer?
>
> MR. KIRKLAND [prosecutor]: I think that is exactly what she was going to —
>
> THE WITNESS: Well put.

(V 4 R 588)

When shown the rule with the high end calibration standard of .20 g/ml, Stockham's reaction was "Typographical [error]" (V 4 R

589). When asked if she had ever calibrated to the standard of .20 g/ml, her answer was: "NO, no one would do that" (V 4 R 589-590).

On November 30, 1998, Petitioner filed a supplemental memorandum of law in support of his motion (V 4 R 614-619).

On January 5, 1999, the trial court granted Petitioner's motion to the extent of ruling that the State was not entitled to the statutory presumptions set forth in Section 316.1934, Florida Statutes (1995), and that evidence of Petitioner's blood alcohol test results would be excluded at trial unless the scientific underpinnings of those results were shown (V 4 R 622-624). The court explained that the applicable regulations, Florida Administrative Code Rules 11D-8.012 et seq., lacked at least four essential requirements-a requirement that sterile blood tubes be used, a requirement that a preservative be present in the blood tubes, specification of the amount of anticoagulant to be present in the blood tubes, and time and temperature restrictions on storage of blood samples before testing-and that there was also a serious error in the rule specifying the high-end value for calibration of gas chromatographs (V 4 R 623-624). The trial court stated that it had considered Wood's testimony in the *Guth* case, as well as the testimony presented at the hearing in the instant case, in making its ruling (V 4 R 623).

The State took an interlocutory appeal to the Second District Court of appeal, which followed State v. *Miles,* 732 So. 2d 350 (Fla. 1st DCA 1999), holding that Rule 11D-8.012, Florida Adminis-

trative Code, is inadequate to protect the due process rights of persons charged with DUI but that the State would be entitled to the legislatively created presumptions of impairment once it laid the traditional predicate for the admission of Petitioner's BAL test results, and certified the same question the Miles court had certified. *State v. Townsend,* 24 Fla. L. Weekly D2587 (Fla. 2d DCA Nov. 17, 1999). Petitioner then sought discretionary review in this Court.

## SUMMARY OF THE ARGUMENT

Florida Administrative Code Rules 11D-8.011-8.014 are adequate in light of their purpose and in view of the right of any DUI defendant to attack the accuracy and reliability of his or her blood alcohol level test results based on a failure to take adequate and appropriate precautions to preserve the blood sample prior to and after testing, and the Second District's holding to the contrary should be overruled.

However, the Second District's holding that the State is entitled in the instant case to the benefit of the statutory presumptions set forth in Section 316.1934, Florida Statutes (1997), if the State proves the traditional scientific predicate for admitting scientific evidence is correct and should be approved. If the State proves that Petitioner's blood sample was properly preserved and tested, it is entitled to the statutory presumptions.

## ARGUMENT

## CERTIFIED QUESTION

WHERE THE STATE LAYS THE THREE-PRONGED PREDICATE FOR THE 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 State is entitled to the legislatively-created presumptions of impairment in a DUI case where the defendant's blood alcohol level (BAL) test results are admitted in evidence at trial.

The argument presented to the trial court was limited to attacking the FDLE rules on their face. The trial court's ruling and the Second District's opinion essentially struck down as unconstitutional on their face the FDLE blood alcohol testing rules.

The State submits that the trial court's order, striking down the rules on their face and depriving the State of a pertinent statutory "presumption," and the Second District's opinion to the extent that it upholds the trial court's ruling are in derogation of legislative intent, public policy, and applicable case law.

The FDLE rules, promulgated by an agency with expertise in the area of blood alcohol analysis, are entitled to the "most weighty presumption of validity," *State Dep't of Health & Rehabilitative Services v. Framat Realty, Inc., 407 So.* 2d 238, 242 (Fla. 1st DCA **1981**). *See Pan American World Airways, Inc. v. Florida Public Service Commission, 427* So. 2d 716, 719 (Fla. 1983) ("administra-

tive 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"). *Cf. Falk v. Beard,* 614 So. 2d 1086, 1089 (Fla. 1993) ("construction of a rule by the agency charged with its enforcement and interpretation is entitled to great weight. Courts should not depart from that construction unless it is clearly erroneous"); Curtis v. Taylor, 625 F. 2d 645, 653 (5th Cir. 1980), *modified on other grounds, 648* F. 2d 946 (5th Cir. 1980) ("When the meaning of an agency's regulation is not clear, deference should be given to the interpretation adopted by the agency that promulgated the regulation and administers the statute").

The rules at issue, "having made their way through the rule-making process, in which those challenging the rule fully participated or had an opportunity to participate, strengthens the case for judicial deference." *Florida Commission on Human Relations v. Human Development Center,* 413 So. 2d 1251, 1254 (Fla. 1st DCA 1982).

Consistent with the deference to the administrative agency's rules, they are presumed to be constitutional, and they are entitled to a construction that renders them so:

> Rules are entitled to a presumption of constitutional validity and should be interpreted, if possible, in a manner that preserves their validity. *See Colding v. Herzog, 467 So.* 2d 980, 983 (Fla. 1985) (nonappealing taxpayers not entitled to refund; tax was assessed on

> basis of "presumptively valid rule"); *Fogarty Brothers Transfer, Inc. v. Boyd, 109 So.* 2d 883, 888 (Fla. 1959) ("As often pointed out, rules of the [agency] are cloaked in a presumption of statutory validity which places on the petitioners the burden of proving their invalidity."); *cf. Trindade v. Abbey Road Beef 'N Booze, 443 So.* 2d 1007, 1011 (Fla. 1st DCA 1983) (court has obligation to apply an interpretation of section 440.15(3)(a)3, Florida Statutes, upholding its constitutionality, if permissible).

*Injured Workers Association v. Dep't of Labor & Employment Security, 630 So.* 2d 1189, 1191-92 (Fla. 1st DCA 1994).

The trial court's order declaring the FDLE rules inadequate and excluding any otherwise applicable permissive inference that Petitioner was under the influence failed to provide the proper deference to the FDLE rules and failed to construe them in such a way that they would be constitutional.

**B. The trial court's order violates legislative intent, which is the polestar for evaluating the validity of the rules at issue**

Petitioner is charged with killing one person and injuring two others while under the influence of alcohol. As an integral part of its attack on the slaughter of innocent people on our streets and highways by drunk drivers, the legislature has enabled FDLE to promulgate rules pertinent to blood alcohol testing. The trial court's order, while, on the one hand, correctly allowing the State to prove the admissibility of Petitioner's blood test results, on the other hand deprives the State of a significant aspect of the legislative assault on the slaughter, i.e., a jury instruction on the permissive inference that Petitioner was under the influence, even if the State proves full compliance with all statutory provisions, all rule provisions, and all other evidentiary predicates for admissibility.

Thus, the trial court's order violates the legislature's intent and the sound public policy behind it, as one of the cases cited by the trial court states: "The overall purpose of this chapter is to address the problem of drunk drivers on our public roadways and to assist in implementing section 316.193 which provides that driving while intoxicated is unlawful." *State v. Bender,* 382 So. 2d 697, 699 (Fla. 1980) (emphasis supplied).

The legislature has repeatedly emphasized its intent that tests of the alcohol content in a person's body and any attendant

"presumption" should be presented to the jury if there are "insubstantial" problems with the testing procedure. §§ 316.1932(1)(f)1, 316.1933(2)(b), and 316.1934(3), Fla. Stat. (1997).

In essence, the trial court's order exalts form over substance by its concern over rules that would make no difference in the reliability of the blood test results in this case. As such, the trial court's order is in unjustifiable derogation of the legislative intent and therefore merits reversal. *See, e.g., State v. Brigham, 694 So.* 2d 793, 798 (Fla. 2d DCA 1997) ("We are not required, however, to interpret the statute 'so strictly as to emasculate the statute and defeat the obvious intention of the legislature"'; reversed trial court orders granting a motion in limine in four consolidated county court DUI prosecutions; "ambiguous" statutory language interpreted to comport with legislative intent).

The trial court's order renders the applicable inference that Petitioner was under the influence a nullity even if the result was reliable and in compliance with all law and rules. The trial court's order thus produces an absurd result and, accordingly, merits reversal. See *State v. Smith,* 547 So. 2d 613, 615 (Fla. 1989) (three-step process of determining meaning of statute includes avoiding unreasonable results); *Dorsey v. State, 402 So.* 2d 1178, 1183 (Fla. 1981); *State v. Webb,* 398 So. 2d 820, 824 (Fla. 1981) ("construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be

avoided"); *State v. Olson, 586 So.* 2d 1239, 1243 n. 5 (Fla. 1st DCA 1991) (avoid absurd results; "reasonable construction of this Hydra-headed statute").

**C. The trial court's order is internally inconsistent**

Seeds of the trial court's error are within its own Order: Conceding that there was no evidence that the analysis of Petitioner's blood is unreliable or inaccurate, the order provides that the scientific underpinnings of Petitioner's blood test results may be shown, pursuant to *Robertson v. State, 604 So.* 2d 783 (Fla. 1992), thereby acknowledging that *Petitioner's* test results may be reliable. However, the applicable test for the constitutionality of a permissive inference, such as this one, looks to the facts of the case.

**D. The nature of a permissive inference and the resulting mode of analysis**

This Court, in *State v. Rolle, 560 So.* 2d 1154, 1156 (Fla. 1990), recognized *County Court of Ulster County v. Allen, 442* U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979), as a leading authority on permissive inferences.

*Allen* 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." 442 U.S. at 156, 99 S. Ct. at 2224, 60 L. Ed. 2d at 791.

*Allen* 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." *442* U.S. at 157, 99 S. Ct. at 2225, 60 L. Ed. 2d at 792 (emphasis in original). For a mandatory presumption, constitutional validity is determined on the face of what the jury is told, not the evidentiary facts of the case:

> To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases.

*442* U.S. at 159, 99 S. Ct. at 2226, *60* L. Ed. 2d at 793.

In contrast to a mandatory presumption, the constitutional validity of a permissive inference depends upon the evidence in the particular case under review, and the challenger of the inference bears the burden of "demonstrat[ing] its invalidity as applied to him" :

> The most common evidentiary device is the entirely permissive inference or presumption, which allows-but does not require-the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. *See, e.g., Barnes v. United States, supra* [412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380], *412* U.S., at 840 n. 3, 93 S. Ct., at 2360 n. *3.* In that situation the basic fact may constitute prima facie evidence of the elemental

> fact. See, *e.g., Turner v. United States, 396 U.S.* 398, 402 n. 2, 90 S. Ct. 642, 645, n. 2, 24 L. Ed. 2d 610. When reviewing this type of device, *the Court has required the party challenging it to demonstrate its invalidity as applied to him.* *E.g., Barnes v. United States, supra, 412* U.S., at 845, 93 S. Ct., at 2362; *Turner v. United States, supra, 396* U.S., at 419-424, 90 S. Ct., at 653-656 [(1970)]. *See also United States v. Gainey,* 380 U.S. 63, 67-68, 69-70, 85 S. Ct. 754, 757-758, 758-759, 13 L. Ed. 2d 658 [(1965)]. 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 [sic] to make an erroneous factual determination.

442 U.S. at 157, 99 S. Ct. 2224-2225, 60 L. Ed. 2d at 792 (emphasis supplied). *See also Francis v. Franklin, 471* U.S. 307, 314 n. 2, 105 s. ct. 1965, 85 L. Ed. 2d 344 (1985).

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. at 165-166, 99 S. Ct. at *2228-2229,* 60 L. Ed. 2d at 797. Thus, the test becomes whether, under the facts of this case, Petitioner 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.

Accordingly, *Marcolini v. State, 673 So.* 2d *3* (Fla. 1996), upheld the DCA's reversal of a trial court order striking down a portion of Section 812.14, Florida Statutes (1991). The statutory provision authorized a finding of a prima facie violation of that section (theft of electricity) upon proof of a "diversion or use of the services of a 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, *State v. Marcolini, 664* So. 2d 963, 966 (Fla. 4th DCA 1995), and reasoned:

> We agree with the district court that *the statute creates a permissive inference and that the constitutionality of the statute must therefore be determined as applied rather than facially.*
>
> * * *
>
> We agree with the district court that the current version of the statute *as applied* to the limited facts presented in this case passes the *rational connection test.* In order for the permissive inference in section 812.14(3) to pass the rational connection test, the record must disclose that the presumed fact, that Marcolini and Acosta violated section 812.14, *"more likely than not" flows* from the following facts which the state must prove.... We find that a defendant is more likely than not in violation of the statute when a fact finder concludes that each of these facts has been proven by the State.
>
> * * *
>
> We emphasize that our analysis of the statute is limited to the bare-bone facts upon which the district court based its analysis. *A complete analysis must still be made in light of the facts presented at trial and the*

> *jury instruction on the statutory presumption.* Jury instructions play an integral role in the final determination of whether that presumption is mandatory or permissive. Thus, if the trial judge on remand determines that the statute passes the rational connection test the judge must instruct the jury as to the application of the statute in accord with the requirements set forth in *Rolle*, 560 So. 2d at 1156, and *Wilhelm v. State,* **568** So. 2d 1, 3 (Fla. 1990) (quoting *Boyde v. California, 494* U.S. 370, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990)). As these cases indicate, the jury instructions must not shift to the defendant the burden of persuasion on an element of the offense charged.

**673 So.** 2d at 5-6 (emphasis supplied, footnotes omitted). Here, there is no evidence in the record to suggest that the result of Petitioner's BAL test was inaccurate and consequently that there was no "rational connection" between the blood test result and the inferred fact.

**E. Applying principles pertaining to the permissive inference here, the trial court erred in reviewing it on its face**

The applicable jury instructions apply Chapter 316's "presumptions" so that if the jury finds that the State established a blood alcohol level at a certain level, then it may[1] use that evidence, in the context of all of the evidence introduced, in determining whether a defendant was under the influence:

> (2)(a). If you find from the evidence

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[1]On the other hand, the "presumption" that "the defendant was not under the influence" if his/her "blood or breath alcohol level... [was] 0.05 percent or less" sounds like a conclusive, mandatory presumption to a defendant's benefit. However, even this instruction is qualified by the instructions' last paragraph.

> that the defendant had a blood or breath alcohol level of 0.05 percent or less, you shall presume that the defendant was not under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired.
>
> (2)(b). If you find from the evidence that the defendant had a blood or breath alcohol level in excess of 0.05 percent but less than 0.08 percent, you may consider that evidence with other competent evidence in determining whether the defendant was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired; ox,
>
> (2)(c). If you find from the evidence that the defendant had a blood or breath alcohol level of 0.08 percent or more, that evidence would be sufficient by itself to establish that the defendant was under the influence of alcohol to the extent that his or her normal faculties were impaired. However, such evidence may be contradicted or rebutted by other evidence.
>
> These presumptions may be considered along with any other evidence presented in deciding whether the defendant was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired.

Fla. Std. Jury Instr. (Crim) Homicide.; *Standard Jury Instructions in Criminal Cases (95-2)*, 665 So. 2d 212, 215 (Fla. 1995).

The foregoing current instruction, which the appealed order concerns, is almost identical to the one upheld in *Rolle* as constituting a permissive inference:

> If you find from the evidence that the Defendant had a blood alcohol level of .10 percent or more, that evidence would be sufficient by itself to establish that the Defendant was

> under the influence of alcohol to the extent that his normal faculties were impaired. However, such evidence may be contradicted or rebutted by other evidence.

*560 So.* 2d at 1155.

Therefore, the "presumption" is a permissive inference, and its rationality must be determined by the particular facts of this case. The trial court sub judice did not consider the facts of this case in making the ruling challenged on this appeal and stated that it would consider them only in terms of whether the State would be allowed to present the blood alcohol test result under *Robertson-without* the permissive inference. Because the trial court denied the State the benefit of the permissive inference based on its determination concerning the adequacy of the face of the rules, it thereby committed reversible error and departed from the essential requirements of the law.

**F. The trial court's application of State *v.* Bender, 382 So. 2d 697 (Fla. 1980), was** erroneous

The trial court's facial analysis failed to examine the facts of this case to determine if Petitioner's blood alcohol test result more-likely-than-not reflected whether Petitioner was under the influence. In this, the trial court erred.

*Bender* was decided in 1980, whereas *Rolle* was decided in 1990, sub silentio overruling any holdings inconsistent with it. However, Bender does not conflict with *Rolle* and the other cases discussed *supra.* *Bender* is consistent with those cases and with in-

structing the jury on the permissive inference.

Bender contains two holdings pertaining to breath testing. As to each of the two challenges, it upheld the pertinent statute and rules. First, it held that the statute was not an unconstitutional delegation of legislative power. Neither the trial court's order nor the underlying motion in this case attacked the permissive inference at issue on this ground. Second, *Bender* held that the omission of an area of concern from the pertinent rules does not render them a violation of due process:

> Further, although the trial court declared moot respondents' motions to suppress breathalyzer for failure to properly incorporate manufacturers' operating manuals by reference in the rules, it still proceeded to note "that the defendants' constitutional rights of due process and equal protection were violated by the failure of HRS and DHSMV to properly incorporate the procedures and methods of the manufacturers for the maintenance and operation of the breathalyzers."
>
> * * *
>
> 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.*

382 So. 2d at 698, 700 (emphasis supplied).

Thus, even assuming arguendo that the method of preserving a blood sample, including the use of a preservative and the modes of transportation and storage, may have a material bearing upon the reliability of the blood test, the omission of preservation requirements from the rule does not per se control. Rather, under the rationale of *Bender,* any DUI defendant against whom the State seeks to introduce BAL test results has the right, in the individual proceeding, to attack, inter alia, the reliability of the preservation procedures followed with respect to the blood samples taken from him or her.

*Robertson* grafted the term "core policies" onto *Bender's* analysis:

> [T]his exclusionary rule does not prohibit the use of all evidence obtained contrary to the implied consent law, but only such evidence obtained in a manner that is contrary to the core policies of that statute: ensuring scientific reliability of the tests, and protecting the health of test subjects. To this extent, the present opinion clarifies the holding of *Bender.*

604 So. 2d at 789 n. 5 (Fla. 1992).

Thus, core-policies analysis pertains to an exception to the exclusion of the blood test result. If the blood test is performed

in violation of the implied consent law but nevertheless meets the "core policies" of the statutes, then it is admissible without the presumption.

Robertson recognizes that the defense may still "challenge the ...regulations themselves as being scientifically unsound, but the burden would rest on the defense to prove this point." *Id.* at 789 n. 6. However, because *Robertson* only "clarifie[d] the holding of *Bender*" and because *Robertson's* footnote 6 cited to Bender, Bender's holding remains viable: *Bender* approved the rules challenged therein. Similarly, the rules' omission of factors theoretically pertaining to the reliability of the test does not render the permissive inference per se inapplicable.[2]

The trial court's analysis is akin to chain-of-custody principles, yet those principles are contrary to the trial court's ruling. Just as the *possibility* of tampering with real evidence is insufficient to render the evidence inadmissible, see, e.g., Terry

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'A more difficult question would be presented if the FDLE rules on their face included a factor for admissibility and for the permissive inference where there was evidence that the factor was associated with unreliability. An example would be a rule requirement that a certain preservative be used when the specified preservative was associated with an artificially inflated BAL test result. In such a case, however, the evidence attacking the rule would pertain to the weight of the result and permissive inference, not to the applicability of the inference. A still tougher question would be raised if the defense evidence attacking the rule as affirmatively misleading and distorting were unrebutted. However, this case concerns none of these worst-case scenarios. Here, Petitioner and the trial court based their arguments and reasoning upon a mere omission of preservative-related factors from the rules. *Bender* controls.

*v. State,* 668 So. 2d 954, 959 n. 4 (Fla. 1996) ("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"), here the *possibility* that Petitioner's blood sample may have deteriorated does not render the presumption inapplicable. Returning to the test for permissible inferences, it was incumbent upon Petitioner to produce affirmative proof that possible preservation-related factors "tampered" with the blood so as to render its results inaccurate. Here, there has not even been a hint of any such problem, see Peek v. State, 395 So. 2d 492, 495 (Fla.), *cert. denied, 451* U.S. 964, 101 S. Ct. 2036, 68 L. Ed. 2d 342 (1981) (hair comparison analysis), *See also Parker v. State, 456 So.* 2d 436, 443 (Fla. 1984) (rejected defense claim of break in chain of custody; "Nothing in the record shows evidence of tampering"); *Brock v. State,* 676 So. 2d 991, 996 (Fla. 1st DCA 1996) ("proper predicate for admitting the emergency room report, including the references to blood alcohol level and intoxication" held to have been laid; "presumably trustworthy laboratory report of urine sample testing positive for cocaine qualified as a business record upon testimony of the laboratory toxicologist supervisor, given as custodian of records, even though the actual conductor of the test was not called to testify"), summarizing and relying upon Davis v. *State,* 562 So. 2d 431 (Fla. 1st DCA 1990).

The 1st DCA reasoned in *McElveen* v. *State, 440* So. 2d 636

(Fla. 1st DCA 1983) (problem with chain of custody), that "the *possibility* of tampering did not rise to the level of a probability." *Id.* at 637 (emphasis supplied). Here, the possibility of deterioration or contamination of Petitioner's blood sample did not rise to the level of a probability. Consequently, the legislative intent of providing the jury with the benefit of the permissive inference should be effectuated.

Moreover, the trial court overlooked the principle that rules regulating an area need not be all-comprehensive in order to be upheld, and the State's experts testified that the existing rules are adequate and that coverage in the rules of the omissions complained of by Petitioner are not essential to protect a DUI defendant's rights or interests.

The State's experts testified as to the purely speculative and improbable nature of the trial court's concerns. Teri Stockham testified that the vials used to collect blood do contain a preservative. She also testified that defense concerns about increased alcohol content of a sample due to the creation of alcohol by microorganisms were extremely improbable: She had never in her seven years of experience been aware of a DUI specimen that was either contaminated or coagulated. The trial court would have FDLE allocate resources to problems that simply do not exist.

In the extremely rare cases where an actual preservation problem may be alleged, extrinsic information can be considered. As

the 1st DCA put it in the context of worker's compensation rules:

> All permanent impairments can be rated by direct reference to the guide, by reference to an analogous condition in the guide, or by reference to an outside source, if necessary; an impairment not listed thus is not excluded. If the guide is silent on an impairment, then other sources can be consulted to rate the impairment.

*Injured Workers Association v. Dep't of Labor & Employment Security,* 630 So. 2d 1189, 1192 (Fla. 1st DCA 1994).

Just as other licensing provisions can be read into implied-consent requisites, when applicable, see *State v. Gillman, 390* So. 2d 62 (Fla. 1980), so can basic evidentiary concepts pertaining to the reliability of the sample.

Here, assuming arguendo any deficiency in the rules, the trial court's identification of what it perceived to be the deficiencies in the rules should have been the basis of determining what other proof would be needed in order for the permissive inference to apply-not a basis for striking down the rules wholesale.

Thus, if the rules are to be judged on their face regarding theoretical possibilities without regard to the facts of the case at hand, *Trindade v. Abbey Road Beef 'N Booze, 443 So.* 2d 1007 (Fla. 1st DCA 1983), should be followed. *Trindade* dealt with a subject area in which an entity had substantial expertise. The outside entity's rules (there an AMA Guide) "covered" the matter in question, but its coverage was held not to be exclusive:

> Section 440.15(3)(a)3., Florida Statutes

> (1979), as interpreted by this court..., purports to require the use of the AMA Guides to determine the existence and degree of permanent impairment....
>
> * * *
>
> ...This valuable treatise [AMA Guide], viewed by the Division as the "best available," is nevertheless-according to much credible medical testimony reflected in the cases coming before us-incomplete and unsuited to the determination of permanent impairment resulting from certain types of injuries.
>
> * * *
>
> ...As the Division indicates,..."it is not error for the deputy to rely on medical testimony of permanent impairment based upon other generally accepted medical standards." ...
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> * * *
>
> We therefore hold that for purposes of determining eligibility for wage loss benefits in accordance with Section 440.15(3)(a) and (b), the existence and degree of permanent impairment resulting from injury shall be determined pursuant to the Guides, unless such permanent impairment cannot reasonably be determined under the criteria utilized in the Guides, in which event such permanent impairment may be established under other generally accepted medical criteria for determining impairment.

443 so. 2d 1008-1009, 1011-12. Here, the State respectfully submits that, for purposes of determining the applicability of the permissive inference, the reliability of the blood test result should be determined pursuant to the FDLE rules unless such reliability cannot be fully determined under them, in which event the

test for reliability of the evidence may be established under other generally accepted evidentiary criteria for determining reliability. *See* also *Injured Workers Association, 630 So.* 2d at 1192:

> All permanent impairments can be rated by direct reference to the guide, by reference to an analogous condition in the guide, or by reference to an outside source, if necessary; an impairment not listed thus is not excluded. If the guide is silent on an impairment, then other sources can be consulted to rate the impairment.

Another instructive case is *Humana, Inc. v. Dep't of Health & Rehabilitative Services, 469 So.* 2d 889, 890 (Fla. 1st DCA 1985). There, an agency rule was upheld in the face of a challenge that the rule did not sufficiently incorporate pertinent considerations. Just as the rules challenged in *Humana* did "not preclude consideration of statutory factors other than numerical need," *id.* at 890, the FDLE rules in issue here do not preclude the use of additional safeguards or procedures that may pertain to the preservation of the blood sample. The omission of a pertinent area does not per se render a rule invalid. Instead, an arguably pertinent factor can be added to the prerequisites for the permissive inference or to the arsenal of possible defenses to attacks on the weight or availability of the inference.

In *Mehl* v. *State,* 632 So. 2d 593 (Fla. 1993), the rules at issue also concerned permitting, 632 So. 2d 593 at 595 ("the public *as well as those who may wish to obtain a testing permit* should be apprised in advance of all approved methods of administering the

test" (emphasis supplied)), rather than, as here, only a general evidentiary concern over the preservation of evidence.

What is more important, *Mehl* concerned the nature of the very "methods of administering the [breath] test," whereas the instant Case concerns only the preservation of the evidence for those tests, a *theoretically* important *ancillary* matter.

*Carino* v. State, 635 So. 2d 9 (Fla. 1994), is instructive. There, this Court adopted the Fourth District's opinion in *State v. Rochelle,* 609 so. 2d 613 (Fla. 4th DCA 1992), *review dismissed sub nom., Comrey v. State, 617 So.* 2d 318 (Fla. 1993). *Rochelle* reversed a trial court order excluding breathalyzer test results, reasoning, 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 ox- the applicability of the statutorypresumptions 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 (emphasis supplied). Thus, the rules need not be all-encompassing to be an initial threshold guide to admissibility

and the applicability of the "presumption." *Accord State v. Berger*, *605 So.* 2d *488, 491* (Fla. 2d DCA 1992), *approved, Veilleux v. State,* 635 So. 2d 977, 978 (Fla. 1994) ("the 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"). *See also Lax v. State, 639 So.* 2d *76* (Fla. 3d DCA 1994), *review denied, 648 So.* 2d 723 (Fla. 1994) (rejected argument that "HRS policies for proficiency testing of previously certified blood analysts were not properly promulgated in the form of a rule"), citing *Mehl*.

The principle in *Goodwin* v. *State,* 610 So. 2d 31 (Fla. 4th DCA 1992), *reversed on other grounds,* 634 So. 2d 157 (Fla. 1994), is on point. There, expert testimony was used to "relate back" a blood alcohol test to the time that the defendant was driving. Even though blood is always drawn after the accident occurred or the defendant was driving in an apparently intoxicated condition, provisions for extrapolation of his/her BAL at the pertinent time based on the BAL test results need not be incorporated into the rules. Indeed, there need not be any testimony on the subject in most cases:

> "the inability of the State to 'relate back' blood-alcohol evidence to the time the defendant was driving a vehicle is a question of credibility and weight-of-the-evidence, not of admissibility, provided the test is conducted within a reasonable time after the defendant is stopped."

610 So. 2d at 32, quoting Miller v. State, 597 So. 2d 767, 770 (Fla. 1992). Similarly, the Florida legislature did not intend to place upon the State the difficult and often impossible burden of anticipating all *possible* factors that *may* affect the preservation of blood. *A fortiori,* the factors raised by Petitioner in the instant case are extremely unlikely to have posed a problem for him according to the undisputed evidence.

As explained in *State v. St. Pierre,* 693 So. 2d 102, 104 (Fla. 5th DCA 1997):

> The state maintains that it met this burden [of showing "substantial compliance with the applicable administrative rules and statutes"] because it complied with the statute and rules by providing a description of the procedures used in taking the test. We agree. Contrary to the defendant's claim, rule 11D-8.013 sets forth no specific standards with regard to the .15 whole blood control....
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> * * *
>
> Importantly, there is no evidence in the instant record to support a finding that substantial compliance was not met. In this regard, the state presented Gayer's uncontradicted testimony that the lapsed expiration date would not affect the accuracy of the blood alcohol test results. At the hearing, the defendant had the opportunity to present evidence to rebut Gayer's testimony but failed to do so.

693 So. 2d at 104. As here, *St. Pierre* involved a defense contention concerning a matter not addressed in the rules, the omission of which was inconsequential to the result. *St. Pierre* reversed not only the exclusion of the test result but indicated that the

State had substantially complied with pertinent implied-consent rules. The State complied here. Accordingly, the State is entitled to the resulting permissive inference in this case, just as it was in *St. Pierre.*

*State v.* Wills, 359 So.2d 566, 569 (Fla. 2d DCA 1978) (Judge Scheb dissenting), *dissent approved, State v. Donaldson, 579 So.* 2d *728,* 729 n. 2 (Fla. 1991), controls:

> From our own statutes and the cases from other jurisdictions cited by the majority, I perceive that the purposes of administrative rules governing the chemical analyses of blood or breath are to ensure the accuracy of the testing procedures and to protect the health of those being tested. I think these objectives were served by the procedures used by the police department in this case. The test here was administered by a licensed technician in compliance with the police department's policy that only technicians licensed by HRS could use the breathalyzer equipment. *There was no evidence before the trial court indicating* that unlicensed personnel had ever taken the key or used the equipment. *Nor was there any evidence that the test results were inaccurate* in *any way.* Under these circumstances I would hold that the equipment was accessible to only authorized technicians within the meaning of the Rule. Accordingly, I disagree with the majority and would not hold the results of the breathalyzer test inadmissible.

Here, as in *Wills,* there was no evidence before the trial court indicating any deterioration of Petitioner's blood sample or that the test results were inaccurate in any way. Compliance and reliability end the inquiry.

*Wissel v. State, 691 So.* 2d 507, 507-508 (Fla. 2d DCA 1997),

is on point:

> The certified question posed to us essentially asks whether every step, aspect or procedure employed in the simulation tests used to inspect breath test instruments pursuant to Florida Administrative Code Rules 11D-8.005 and 11D-8.006 must be expressly prescribed by rule or regulation required by section 316.1932(1)(f)1 and adopted pursuant to chapter 120, The Florida Administrative Procedures Act. We hold that procedures that are implicit and incidental to procedures otherwise explicitly provided for in a properly adopted rule or regulation do not require further codification by a further adopted rule or regulation. In our opinion, to hold otherwise belies statutory intent and/or common sense.
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> * * *
>
> Appellant argues that there is no properly adopted rule or regulation that defines "vapor mixture" or that specifies the "'procedures" on how to mix or produce a simulator vapor solution; on how to clean the glassware utilized; the type of glassware to be used; or from what source the stock solution should be obtained. We conclude that such details of the manner of conducting the simulator tests required by Rules 11D-8.005 and 11D-8.006 are implicit and inherent in the details of the scientific requirements specifically expressed in the rules.
>
> While addressing different issues than are raised by this appeal, the decision in *State v. Fx-iedrich, 681 So.* 2d 1157 (Fla. 5th DCA 1996)[, *review denied, 690 So.* 2d 1299 (Fla. 1997)], is helpful and instructive in understanding our conclusions as to the issue raised before us. The court in *Friedrich* stated: "The... attack on the admissibility, in general, of the results of the breath tests based on the range of composition of the stock solution is speculative and theoretical."
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> We likewise conclude that appellant's

> 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 hypertechnical.

Here, inclusion in the FDLE rules of detailed methods relating to the preservation of blood samples is unnecessary because the use of appropriate preservation materials and techniques is implicit and incidental to procedures otherwise explicitly provided for in a properly adopted rule or regulation. They do not require further codification by a additional adopted rules or regulations. To hold otherwise belies statutory intent and common sense. Thus, the trial court's exclusion of the permissive inference was hypertechnical and without due regard for the legislative intent that the inference be permitted where the applicable rules are met in the context of facts that do not undermine confidence in the test result.

Consistent with the presumption of correctness attached to the rules and the burden on the defense to affirmatively establish unreliability, as *Robertson* put it: "Once a blood-alcohol test is validly taken under subsection 316.1933(2), the Florida Statutes then create a presumption that anyone with a blood-alcohol content of 0.10 percent [now, .08%] or more is impaired." *604* So. 2d at *788.*

The reliance of the majority in *State v. Miles, 732 So.* 2d 350 (Fla. 1st DCA 1999), on *Mehl* is misplaced: *Mehl* mandated the pro-

mulgation of rules "specifying the precise *methods of blood alcohol* testing that are approved for use in this State." 632 So. 2d at *595.* Petitioner's complaints below did not concern the approved methods of blood alcohol testing, but rather related to the *preservation of blood samples prior to and after testing,* an issue not addressed in *Mehl.* Accordingly, the State agrees with Judge Wolf's well-reasoned dissent in *Miles* and urges this Court to do the same. Judge Wolf stated in pertinent part:

> Section 316.1932, Florida Statutes, does not require the Florida Department of Law Enforcement (department) to adopt rules relating to preservation of blood samples, nor does the failure to adopt such rules constitute a denial of due process. *See State v. Bender, 382 so.* 2d 697, 700....
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> * * *
>
> The trial court heard testimony that failure to properly preserve blood samples taken from a defendant could result in an inaccurate alcohol reading. It was the Department of Law Enforcement's position that the statute did not require adoption of a rule relative to storage of blood because it was common knowledge that blood samples should not be overheated. The chemist for the department testified that the department did not want to create a "monster" rule, and therefore, it did not address the obvious. The trial court agreed that the statute in question does not specifically require that rules be adopted for the collection, storage, or transportation of blood samples. While the trial court did not directly rule on the constitutionality of the statute or the rule in question, the court did, however, find that the failure to adopt rules resulted in a denial of due process. The trial court concluded, therefore, that the state would not be entitled to any of the pre-

sumptions contained in section 316.1934, Florida Statutes, even if it independently established a proper predicate for the admission of the test result.

A careful reading of the case law concerning the duty to adopt rules in this area does not support the trial court's position concerning the state's failure to adopt rules or the remedy for failing to do so. The statutory duty is contained in section 316.1932-(1)(f)1., Florida Statutes, which provides in pertinent part as follows:

> The tests determining the weight of alcohol in the defendant's blood or breath shall be administered at the request of a law enforcement officer substantially in accordance with rules of the Department of Law Enforcement. Such rules must specify precisely the test or tests that are approved by the Department of Law Enforcement for reliability of result and ease of administration, and must provide an approved method of administration which must be followed in all such tests given under this section.

In State v. Bender, 382 So. 2d 697 (Fla. 1980), the respondent argued that the presumption statute was unconstitutional and the failure of the department to incorporate the manufacturer's procedure for operation and maintenance of the breathalyser within its rules constituted a denial of due process. The supreme court (1) held the statute adopting the statutory presumptions was constitutional; (2) stated that test results are admissible and statutory presumptions are applicable if compliance with the statute and administrative rules is accomplished; (3) determined that application of the statutory presumptions did not deny a defendant due process, because "[t]he presumptions are rebuttable and a defendant may attack the reliability of the testing procedures"; and (4)

> determined that the failure to adopt certain rules relating to the testing procedure did not constitute a denial of due process because "the respondents clearly have the right in their individual proceedings to attack the reliability of the testing procedures or operator's qualifications." Id. at 700.
>
> In the instant case, we have the same type of claim as in Bender, that the failure to adopt rules relating to a critical portion of the testing process results in the denial of due process. In Bender, the court was dealing with operation and maintenance of the actual testing machines. In the instant case, we are dealing with matters related to the chain of custody. While the evidence in this case indicates that it would probably be a better public policy decision to adopt rules relating to storage or preservation of blood samples, it is not our job to determine what rules should be adopted for the public benefit, that is within the province of the legislative branch. It is also not our job to second guess the department on the wisdom of failing to adopt the aforementioned rules. We must address the constitutionality of the present statutory and regulatory scheme. 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. 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. 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.

***Id.*** at 353-355 (footnote omitted).

Finally, as to the error in the calibration rule, the uncontroverted evidence demonstrated that it had been corrected and

that it had not prejudiced anyone. As Dr. Stockham indicated, it was obviously a typographical error, and any technician or other laboratory personnel involved in compliance with that rule, if they noticed it at all, would realize that it was a "typo." The validity of this conclusion was established by Mr. Wood's testimony that *no one* applying for the required permit had submitted an analytical procedure using a calibrator at .20 g/ml in literal compliance with the typographical error (V 3 R 382-383, 387).

In conclusion, if any due process rights were violated in terms of fairness, they were the State's: **The trial court opted for the most extreme sanction for omissions from the rules, the total exclusion of the implied-consent permissive inference, despite a complete lack of evidence to indicate that the complained-of omissions were of any consequence in this or any other case.** This ruling was erroneous and must be reversed.

## CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court approve the holding of the district court below that the State is entitled to the jury instructions regarding the statutory presumptions of impairment if it successfully introduces the evidence of Petitioner's blood alcohol level test results but disapprove the district court's holding that Rule 11D-8.012, Florida Administrative Code, is inadequate to protect the due process rights of persons charged with DUI.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

SUSAN D. DUNLEVY
Assistant Attorney General
Florida Bar No. 229032
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2367
(813) 873-4739

COUNSEL FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Clinton A. Curtis, Esq., P.O. Drawer 7608, Winter Haven, Florida 33883-7608, this 21st day of January, 2000.

Susan D. Dunlevy
COUNSEL FOR RESPONDENT