IN THE SUPREME COURT OF FLORIDA

DEAN A. TOWNSEND,

Petitioner,

CASE NO. 1999-28
Lower Tribunal No. 99-275

vs.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF FONT AND TYPE SIZE

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

RECORD CITATIONS FORM

References to the record are made by reference to the Record on Appeal using the following abbreviations as appropriate: R. ___

STATEMENT OF THE CASE AND FACTS

Petitioner brings this case to this Honorable Court through a question that the Second District Court of Appeal certified as one of great public importance:

> Where the state lays the three-pronged predicate for admissibility of blood-alcohol test results in accordance with the analysis set forth in Robertson v. State, 604 so. 2d 783 (Fla. 1992), thereby establishing the scientific reliability of the blood-alcohol test results, is the state entitled to the legislatively created presumptions of impairment?

State v. Townsend, 24 Fla. L. Weekly D2587 (Fla. 2d DCA Nov. 17, 1999).

The Second District Court of Appeal opinion containing the certified question was the result of an interlocutory appeal by the Respondent from a trial court's Order on Motion to Suppress and/or Motion in Limine (hereafter referred to as "the Motion." The Motion, which Petitioner filed in the circuit court, sought to suppress blood-alcohol test results and challenged the rules of the Florida Department of Law Enforcement ("FDLE") pertaining to blood testing that was taken at the scene of the traffic accident pursuant to the Implied Consent Statutes and subsequently delivered to the FDLE for testing.

The Motion alleges, in summary, that the FDLE rules (collectively referred to as the "Rules") promulgated under the Implied Consent Statutes, Sections 316.1932 through 316.1934, *Florida Statutes* (1995), are inadequate to ensure the reliability

of the blood alcohol level test results because they fail to provide for proper collection, storage, and transportation of blood samples in compliance with the core policies of Florida's Implied Consent Statutes; and that admission of a blood sample collected pursuant to FDLE Rule 11 D-8.012, the only rule addressing collection, storage and transportation of the blood sample (hereafter referred to as the "Rule"), violates Petitioner's rights to due process of law. (R. 79-411).

Section 316.1932(1)(f)1, *Florida* Statutes (1995) requires:

> 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.* (Emphasis added)

Section 316.1933(2)(b), *Florida* Statutes (1995) states, in relevant part:

> The Department of Law Enforcement may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits that are subject to termination or revocation at the discretion of the department.

Section 316.1934, *Florida* Statutes (1995) states, in relevant part:

> (2) . . . the results of any test administered in *accordance* with s. 316.1932 or s. 316.1933 and this section are admissible into evidence when otherwise admissible...
>
> (3) A chemical analysis of a person's blood to determine alcoholic content . . . . *in order to be considered valid* under this section, must have been performed substantially in accordance with methods approved by the Department of Law Enforcement... The Department of Law Enforcement may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits that are subject to termination or revocation at the discretion of the department. (Emphasis added.)

The relevant rules, as promulgated by FDLE, regarding blood alcohol tests are found in Rules 11 D-8.011, 11 D-8.012, 11 D-8.013, and 11 D-8.014, *Florida Administrative Code.* Rule 11 D-8.012, entitled "Blood Samples - Labeling and Collection," is the only rule relating to the collection, storage, and transportation of the blood samples. It states as follows:

(1) All blood sample vials or tubes shall be labeled with the following information:

(a) Name of person tested;
(b) Date and time sample collected;
(c) Initials of personnel collecting the sample.

(2) Cleansing of the person's skin in collecting of the blood sample shall be performed with a non-alcoholic antiseptic solution.

(3) Blood samples shall be collected in a vial or tube containing an anticoagulent substance. Said vial or tube shall be stopped or capped to prevent loss by evaporation.

Dr. Edward N. Willey, a pathologist and former medical

examiner, testified at the hearing on this matter that the FDLE Rules are inadequate to ensure a reliable result. (R. 436). Specifically, Dr. Willey testified to the following scientific inadequacies:

1) The Rules do not reference either a requirement for a certain type of anticoagulent or specify an amount of anticoagulent; (R. 437)

2) The Rules do not reference a requirement that the vial be inverted or agitated to thoroughly mix the anticoagulent; (R. 439-440)

3) The Rules do not require a preservative; (R. 440-441)

4) The Rules do not require that the tubes or vials be sterile; (R. 443)

5) The Rules do not reference the temperature element of storage; (R. 449)

6) The Rules do not reference the storage interval contemplated or mandate when the sample must be transmitted to the laboratory; (R. 449: 452)

7) The Rules do not require batch or periodic testing to ensure that a nonalcoholic antiseptic solution is used to disinfect the skin; (R. 450-451)

8) The Rules do not prescribe either a manufacturer or a source or preapproved kit which would help establish statewide uniformity; (R. 451-452)

9) The Rules do not mandate a chain of custody form, other than a requirement that the name of the person tested be written on the vial (R. 452)

Another expert for Petitioner, Richard E. Jensen, Ph.D. (hereafter referred to as "Jensen") testified 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." (R. 488). He further stated the following:

1) The Rules do not specify the anticoagulent to be used Or the quantity to be used; (R. 489)

2) The Rules do not require a preservative to be used; (R. 489-490; 493)

3) The Rules do not direct how to properly mix the anticoagulent or preservative; (R. 496)

4) The Rules do not provide for periodic monitoring of non-alcoholic swabs contained in the kits;[1] (R. 497)

5) The Rules do not require the tube to be sterile; (R. 504)

6) The Rules have no criteria regarding storage; (R. 505)

7) The Rules have no time frame within which to collect or deliver the sample to the analyst; (R. 506)

8) The Rules have no chain of custody requirement; (R. 507)

9) The Rules have no standardization as to how many standards are measured to prove that the device is operating properly and as to how close those measurements must agree; (R. 507-508)

10) The Rules do not require that a minimum of two tests be conducted on a blood sample; (R. 508)

11) The Rules do not require a log with an automatic sampling gas chromatograph, identifying which samples are placed in what location and in what sequence the analysis is completed; (R. 511)

12) Subparagraph 2B of the Rule specifies the low level of concentration that should be checked and the high level of concentration that should be checked by a procedure. The high

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[1] Jensen discussed a case in which a phlebotomist obtained a blood sample, using what was thought to be a non-alcoholic swab. Testing showed a blood alcohol level (BAL) of 0.217. Repetition of the test by another hospital who took its own sample within seventy (70) minutes produced a BAL of 0. The first swab proved to contain alcohol. (R. 498, 511-512). Jensen also described a research project which revealed that a purportedly nonalcoholic swab routinely used by two states contained alcohol. (R. 499)

level is out of range as it is marked as two-tenths of a gram per milliliter of alcohol (0.2 g/ 1 ml) which is a twenty-percent (20%) alcohol solution. (R. 509)

Petitioner's experts established that the integrity of a blood sample is dependent on a number of things. Clotting or micro-clotting, as a result of not using anticoagulent, not using a sufficient amount of anticoagulent, or not mixing the anticoagulent properly, can make the test read artificially high or artificially low. (R. 438-440; 491). Furthermore, a preservative is necessary to prevent enzymatic creation or destruction of alcohol that would alter the result. (R. 441). As Jensen stated:

> Once biological samples are obtained from a living individual, they begin to decay, no matter what you do, and some of the decaying process can produce ethyl alcohol, that same alcohol that you test for in drinking cases. So it is imperative that preservative be placed in biological specimens, or at least that the specimen be preserved in some manner so that that degradation does not occur. (R. 493).

Testimony established that if the preservative or anticoagulent is not properly distributed in the blood through agitation or invertation of the vial, the substance will dry on the bottom and crystallize or concentration striations may form. (R. 446-447) (R. 524). Temperature is also vital because organisms thrive in higher temperatures. "They generally have a rate that increase by a factor of two for each ten degrees centigrade that's raised in temperature within the scope of usual biological

organisms.., And the second thing is that high temperature over a long period of time with oxygenated hemoglobin will actually destroy alcohol." (R. 449-450).

When asked why one cannot assume the vial is sterile, Jensen replied:

> We can. We can assume that, we can just go right ahead and assume it, but in terms of the practice of science, that's inadequate, because the challenge to the scientist, particularly the one who makes measurements, is that you must control the variables. And that's a variable that we have to be concerned with, the same reason as we have to be concerned with anticoagulent, for homogeneity, for preservative, so that we don't have any detrimental decay of the sample, and for the manner in which the sample is collected. (R. 504-505).

On the subject of standardized kits, Jensen stated:

> It's necessary to have a standardized kit for two reasons. One is that it ensures the fact that everybody's sample is collected the same way, preserved the same way and transported the same way. Secondly, it is imperative to have a standardized kit that's used in every blood draw so that we know the variables can be controlled. The purpose of any scientific experiment or analysis is to control the variables. That is, you can then dictate, from the state's position, or from the laboratory's position, the type and quantity of both anticoagulent and preservative and ensure the fact that they are there having an ongoing testing program to prove that they're there. And you may also test the swab to ensure the fact that as an ongoing program it has no alcohol in it. That's not uncommon in state programs. (R. 500-501).

Standardized kits are often used to avoid varying concentrations of

preservative and anticoagulent in one sample versus another sample, since the presence of different concentrations of salt will give differing results by head space gas chromatography. (R. 503). More than half of the states have established standardized kits. (R. 504).

The testimony of Thomas M. Wood ("Wood") in the case of State v. Guth, Case No. TO95-78392 (Fla. Orange County Ct., Sept. 9, 1996) was admitted in evidence as former testimony. (R. 328-394; 553-556). Wood, the senior crime laboratory analyst for the FDLE Implied Consent Program, testified that when HRS promulgated the Rule on collection, storage and transportation (the predecessor to the Rule at issue in this case), it required that the blood tubes contain a preservative. Jensen also testified that the old HRS Rules required a preservative. (R. 510). The FDLE promulgated Rule in the instant case omits this requirement. wood did not know why this requirement had been omitted. (R. 364-365). He further admitted:

1) that the lack of a preservative "could... compromise the scientific reliability of the blood result;"

2) that he "would expect a preservative to be used;"

3) that "the preservative would either destroy the microbe or prevent it from multiplying or consuming the alcohol;"

4) and, that he was "surprised" that the preservative was omitted from the current Rules and because the Rules failed to provide for a preservative and/or refrigeration of a sample "the blood would be more vulnerable, there is no doubt about that, if it had no preservative."

Teri Stockham, M.D., a toxicologist appearing on behalf of Respondent, also agreed that the Rules were inadequate because they fail to require that documents created during the testing procedure be retained by the testing analyst. (R. 583-586).

Rule 11D-8.013(1)(e)2c, which became effective on March 8, 1994, provides 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. (R. 351). The latter range was a mistake as the denominators on both of the fractions should have been 100 ml rather than 1 ml. (R. 351-352; 354-355; 358-359). Wood discovered the typographical discrepancy on August 10, 1995, but he took no action for approximately two months. (R. 382-383; 387; 595-6). The test in the instant case was conducted on August 26, 1995. The rule was ultimately changed in November 1995. (R. 388-389).

The Circuit Court granted Petitioner's motion to the extent of ruling that Respondent had to establish the scientific underpinnings of the blood alcohol test prior to its admission and that Respondent was not entitled to the statutory presumptions set forth in Section 316. 1934, *Florida Statutes* (1995). (R. 622-624).

Affirming in part and denying in part the trial court's order that excluded the blood-alcohol test results and the presumption, the majority of the Second District Court of Appeal certified the question quoted supra and noted that:

> In State v. Miles, 732 So. 2d 350 (Fla. 1st DCA 1999), the First District decided the issue presented in this case by affirming a trial court decision that found the rule inadequate to protect the due process rights of persons charged with DUI. As to the jury instruction, however, the First District held that the State would be entitled to the legislatively created presumptions of impairment once it laid the traditional predicate for the admission of the blood-alcohol test results. We agree with the First District and adopt the holding of Miles. Accordingly, we deny in part the State's petition for certiorari by upholding the trial court's decision to require a Robertson predicate for the admission of the blood-alcohol test results in Townsend's trial. We grant the petition in part so that the State may receive the jury instructions regarding the evidence of test results.

Judge Blue concurred with the majority opnion, but stated:

> I concur entirely in the decision to affirm the trial court's finding that the rule is inadequate. Based on the evidence before the trial court it is evident the Department's rule is deficient. I am less sure about reversing the trial court's ruling that the State would not receive the jury instruction on the statutory presumptions arising from the implied consent law. My reading of Robertson leads me to believe that when blood test results are admitted outside the provision of the implied consent law, the presumptions are not available to the State.

SUMMARY OF THE ARGUMENT

The trial court's ruling that the "defects in the Rule combine together to fail to ensure a scientifically accurate result, even if the rules are followed by the testing laboratory" precludes Respondent from utilizing the Implied Consent Statutes and mandates that Respondent introduce the test results through a traditional predicate. As a result, the presumption of impairment cannot apply since the presumption arises only when the test result is obtained in compliance with the legislatively created Implied

Consent Statutes, which require the fulfillment of enunciated core policies, namely to "'ensure the reliable scientific evidence for use in future court proceedings' by establishing uniform, approved, procedures for testing" and "to protect the health of those persons being tested, who by this statute have given their implied consent to these tests."

ARGUMENT

CERTIFIED QUESTION [2]

> 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?

Petitioner respectfully submits the following issues for this Honorable Court's consideration, which bifurcate the certified question into two distinct issues: (1) the specific area of the Rules' inadequacy[3] and (2) Respondent's entitlement to the statutory presumption of impairment under the implied consent statutes when the results are not obtained nor introduced pursuant to the terms of that statute.

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

[3] An understanding of the basis for the trial court's order is necessary when addressing the issue of the presumption.

I. THE TRIAL COURT'S ORDER, THAT THE RULES PROMULGATED BY THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT FOR COLLECTION OF BLOOD SAMPLES UNDER THE IMPLIED CONSENT LAW ARE INADEQUATE AND UNRELIABLE, IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

The trial court made no factual findings as to the reliability of the blood sample in this particular case, but merely examined the facial adequacy of the Rules. Such an attack is proper by a defendant in a criminal case. The Second District Court of Appeal has previously determined that a requirement that a defendant administratively challenge the validity of administrative rules would impinge on his right to a speedy trial and contravene the goals of good judicial policy. State v. Berger, 605 So. 2d 488 (Fla. 2d DCA 1992). See also, State v. Burke, 599 So. 2d 1339 (Fla. 1st DCA 1992) (Court held that defendant in criminal proceeding had standing to attack the lack of rules relating to the method of administration of blood alcohol test.) Most importantly, this Court has stated that a defendant in a criminal case may attack the reliability of the testing procedures and the standards establishing the zones of intoxication levels in cases involving vehicle driver intoxication where the results of tests taken pursuant to the implied consent law are sought to be proffered into evidence. State v. Bender, 382 So. 2d 697 (Fla. 1980).

The trial court made the following factual determinations in this case **which are supported** by competent, substantial evidence:

(1) The 1995 Rules lack at least four essential requirements.

(2) There is no requirement for: sterile blood tubes, the presence of a preservative, the amount of anticoagulent in the tubes and no time and temperature restrictions on storage of the filling tubes before testing.

(3) These defects in the Rule combine together to fail to ensure a scientifically accurate result even if the rules are followed by the testing laboratory; and

(4) There is a serious error in the Rule, as it existed in 1995, that required gas chromatagraphs to be calibrated for a high-end value at one hundred times the level that could be expected in human blood. As a result, if the labs followed the Rule as written, the results would be unreliable. (R. 622-624)

Petitioner disputes the validity of the enacted Rules, because they do not go far enough to adequately ensure that the "core policies" of Florida are carried out. Petitioner's argument is not hypertechnical, nor does he suggest that every aspect of collection, handling, storage and preservation need be expressly prescribed by rule or regulation. However, the legislature authorized and directed the agency to promulgate rules to ensure scientific reliability and it has failed to do so.

Petitioner recognizes a line of cases which state:

> [P]rocedures 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. Id. (Emphasis added.) Wissel v. State, 691 So. 2d 507 (Fla. 2d DCA 1997).

This case is different because the Rules under consideration do not "otherwise explicitly provide for" collection, storage, and transportation of the blood samples. Furthermore, the need for a

preservative and type and quantity of an anticoagulent can hardly be denominated as "incidental" when they strike at the very core of the scientific reliability.[4] In fact, at the hearing on this matter, the trial court specifically addressed this concern:

> Tell me to what extent it's permissible for a policy to supplant a rule in the sense that if it's good scientific practice that's routinely used in labs of this kind not to put that in the requirement of the rule because it's an assumption. For instance, from the last witness's testimony, she did say that she would never test or give results for clotted blood. So if that's the standard in the industry that they'll never tell you that the alcohol content of clotted blood is, then there's no reason for a rule to prevent blood clotting, just as an example. Is it legal for them to have a industry practice built into the assumptions that undermine the rules so they don't have to be stated in the rule?
>
> (R602-3)

The Circuit Court in the Ninth Judicial Circuit, acting in its appellate capacity, dealt with this identical issue:

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[4] See e.g., State v. Reisner, 584 So. 2d 141 (Fla. 5th DCA 1991)(Court held that since administrative rules requiring periodic checks of instruments used for testing blood alcohol level are vague and undefined, unpromulgated rules are not acceptable and granted motion to suppress.) Compare, State v. Rochelle, 69 So. 2d 613 (Fla. 4th DCA 1992)(Court denied motion to suppress but distinguished its ruling, on the identical issue, from Reisner by the fact that no testimony was presented by either side to explain the importance or insubstantiality of the deviation in the procedure as was done in Reisner.) In the instant case, expert testimony established and the trial court ruled that the lack of specific rules substantially impact the scientific reliability of the blood tests, therefore promulgated rules required.

> The deficiencies found by the lower court are neither inherent in nor incidental to the procedures already provided, particularly with regard to the need for a preservative. The lack of reference to a preservative or alternate methods of preservation goes beyond the merely incidental to the scientific reliability of the test results. State v. Guth, (Case No. CJAP 96-75) Circuit Court of the Ninth Judicial Circuit, March 30, 1998.

The trial court based its factual rulings on the testimony of the expert witnesses at the hearing in this matter and the testimony of Wood, senior crime laboratory analyst, FDLE, taken in State v. Guth, Case No. TO95-78392, Orange County Court on September 9, 1996, and admitted into evidence at the hearing on this matter upon the consent of all parties. (R. 328-394; 553-556; 622-624).

Based on the outlined factual determinations, the trial court concluded that the existing Rules would not ensure a reliable result,[5] and therefore, the blood test results are inadmissible *until* Respondent proves the traditional scientific predicate for admitting scientific evidence. Thus, the State can still proceed with its case by establishing that the scientific test of intoxication is admissible in evidence without any statutory authority. This requires a showing that '(1) the test is reliable,

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[5] A factual decision by the trial court is entitled to deference commensurate with the trial judge's superior vantage point for resolving factual disputes and, thus, the trial court's determinations are entitled to great deference. State v. Setzler, 667 So, 2d 343, 344-45 (Fla. 1st DCA 1995).

(2) the test was performed by a qualified operator with the proper equipment, and (3) expert testimony was presented concerning the meaning of the test." Robertson v. State, 604 So. 2d 783, 789 (Fla. 1992). As this Court is well aware, DUI cases were prosecuted for years using this method.

II. THE STATE IS NOT ENTITLED TO THE STATUTORY PRESUMPTION OF IMPAIRMENT UNDER THE IMPLIED CONSENT STATUTES, UNLESS THE RESULTS ARE OBTAINED PURSUANT TO THE TERMS OF THE STATUTE

The State [Respondent] insists on the benefit of Section 316.1934(1)(c) that provides, in relevant part:

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

The FDLE did not establish reasonably definite rules specifying the precise methods of collection, handling, storage and preservation of blood alcohol tests that are approved for use in this State. Because the test results were not obtained pursuant to the requirements of the Implied Consent Statute the statutory presumption of impairment does not apply. **The presumption of impairment is a legislatively created presumption and exists only within and as a result of the express terms of the Implied Consent Statutes.**

Prior to the enactment of the Implied Consent Statutes the

State had the burden of establishing, by competent evidence, the relationship between the blood-alcohol level and the driver's impairment. Impairment of the driver's "normal faculties" was and is a critical element in DUI prosecutions.[6]

The Implied Consent Statutes, initially codified in Chapter *322* of the Florida Statutes (now Sections 316.1932 through 316.1934, Florida Statutes (1995)) provide that any person who accepts the privilege of operating a motor vehicle within Florida is deemed to have given his consent to an approved chemical test or physical test for the purpose of detecting if the individual was driving under the influence of alcoholic beverages or chemical/controlled substances. The Implied Consent Statutes not only presume admissibility of tests conducted pursuant to its terms, but add another evidentiary presumption, that is: if the statutorily approved procedure produces specific test results, a presumption of impairment arises to satisfy one of the elements of a DUI prosecution.[7] Compliance with the Implied Consent Statutes not only relieved the State of the burden of demonstrating

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[6] The term "normal faculties" is defined as including the "ability to see, hear, walk, talk, judge distances, drive an automobile, make judgments, act in emergencies, and, in general, normally perform the many mental and physical acts of daily life." Section 316.1934(1), Fla. Stat. (1995).

[7] Section 316.193(1)(a), (b), Florida *Statutes (1995)* provides that a person is guilty of driving under the influence if he is "affected to the extent that the person's normal faculties are impaired; or . . . [t]he person has a blood-alcohol level of 0.08 or more grams per 100 milliliters of blood."

reliability of the test where the statute had been followed, but eliminated the state's evidentiary burden of establishing the critical element of impairment.

In enacting the Implied Consent Statutes, the legislature attempted to fulfill its "core policies," namely to "'ensure reliable scientific evidence for use in future court proceedings' by establishing uniform, approved, procedures for testing" and "to protect the health of those persons being tested, who by this statute have given their implied consent to these tests."[8] The Legislature attempted to codify the core policies, but directed the FDLE to promulgate specific rules on the matter.

Section 316.1932(1)(f)1, *Florida Statutes (1995)* requires:

> 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.* (Emphasis added.)

Section 316.1933(2)(b), *Florida Statutes (1995)* states, in relevant part:

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[8] Robertson v. State, 604 So. 2d 783 (Fla. 1992), citing State v. Bender, 382 So. 2d 697 (1980).

> The Department of Law Enforcement may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits that are subject to termination or revocation at the discretion of the department.

Section 316.1934, *Florida* Statutes (1995) states, in relevant part:

> **(2)** . . . the results of any test administered in *accordance* with s. 316.1932 or s. 316.1933 and this section are admissible into evidence when otherwise admissible...
>
> (3) A chemical analysis of a person's blood to determine alcoholic content . . . . *in order to be considered valid* under this section, must have been performed substantially in accordance with methods approved by the Department of Law Enforcement... The Department of Law Enforcement may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits that are subject to termination or revocation at the discretion of the department. (Emphasis added.)

Courts routinely recognize the importance of the enunciated core policies in the Implied Consent Statutes.

> In Bender, the Court conducted a thorough analysis of Florida's "implied consent law" and its relation to the earlier common law and other evidentiary principles governing the admissibility of expert testimony in a DUI-related prosecution. First the Bender Court expressly recognized that the ***implied consent*** law ***includes an exclusionary rule prohibiting the use of blood- test results taken contrary to its core policies:***

> ***The test results are*** **admissible** ***into evidence only upon compliance with the statutory provisions and the administrative rules enacted by its authority. Id.*** (Emphasis added).

This exclusionary rule in the Implied Consent Statutes has additional significance given that the legislature codified a presumption of impairment within the Implied Consent Statues.' As stated by the Fifth District Court of Appeal on the Implied Consent Statutes:

> One intent of the purpose for specifying the method and means for such chemical tests is to ensure that only ***reliable scientific evidence*** is used in court proceedings to protect rights of defendants facing the repercussions of statutory presumptions in their criminal trials.[10] (Emphasis added).

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[9] Respondent outlines numerous cases on the issue of permissive inference versus mandatory presumption for the purpose of urging that the presumption of impairment is no more than a permissive inference. This ignores the majority of caselaw dealing with the Implied Consent Statutes (including Robertson, supra, which this Court wrote after its holding in State v. Rolle, 560 So. 2d 1154) which clearly designates the presumption as just that, a presumption. Further, Petitioner is not arguing the constitutional validity of the presumption contained in the Implied Consent Statutes, which arguably may require an 'as applied" test of constitutionality, but is only attacking the validity of the first prong of the Implied Consent Statute. It is Petitioner's position that the test was not validly taken under Section 316.1933. Only a valid test - one taken to ensure scientific reliability and the health of the test subject- triggers the presumption in Section 316.1934. Roberston, supra. Respondent is assuming the test was validly taken, but as the trial court's factual determinations indicate, the Rules "would not ensure a reliable result." (R. 624)

[10] State v. Risner, 584 So. 2d 141 (Fla. 5th DCA 1991), rev. denied, 591 So. 2d 184 (Fla. 1991).

Should the presumption of impairment be allowed, without regard to the statutory procedure, the presumption of impairment would be permitted under circumstances not contemplated by the Legislature. As a result, Respondent would be excused from proving an essential element or fact necessary to constitute the crime beyond a reasonable doubt.[11] The statutorily created presumption exists only as a sequential step of the Implied Consent Statutes. Given the unified legislative purpose behind the statutes that have been denominated a "total package of interrelated provisions" or "unified package of law,"[12] it is clear that the presumption arises when and only when the FDLE fulfills its obligations imposed by the statutory authority to ensure scientific reliability and only when the test is admitted through the Implied Consent Statutes.

In the case of Robertson v. State, this Court ruled that the blood test was admissible without the statutory aid of the Implied Consent Statutes, through a traditional predicate, but as a result, all presumptions created by the implied consent law, including the presumption of impairment, did not apply.[13] "Likewise, in Strong, we held that failure to adhere to the implied consent law and its

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[11] In re Winship, 397 U.S. 358, 364 (1970). Accord Morgan v. State, 392 So. 2d 1315, 1316 (Fla. 1978).

[12] State v. Bender, 382 So. 2d 697, (Fla. 1980); State v. Reisner, 584 So. 2d 141 (Fla. 5th DCA 1991) rev. denied, 591 So. 2d 184 (Fla. 1991); Mehl v. State, 632 So. 2d 593, 595 (Fla. 1993).

[13] Robertson v. State, 604 So. 2d 783 (Fla. 1992).

related regulations did not render blood tests inadmissible where blood was drawn for *an* exclusively *medical purpose*... Once again, however, the state is not entitled to rely on any of the presumptions created by the implied consent law..." Id., citing, State v. Strong, 504 So. 2d 758, 760 (Fla. 1987).

In dealing with the admissibility of a horizontal gaze nystagmus test ("HGN") as evidence of impairment, the Third District Court of Appeal ruled that the codified presumption of impairment was not triggered and stated:

> It is apparent that while the legislature may have left the door open to admit other types of testing methods as evidence of impairment, the legislature clearly intended that a presumption as to whether a person was or was not under the influence of alcoholic beverages to the extent of legal impairment can only arise based upon chemical analysis of blood or breath testing.
>
> It is the legislature's role to determine which tests may be used to establish a presumption of impairment. Where the legislature has prescribed specific tests for a specific purpose, it is not this court's role to add other...Accordingly, we hold that HGN test results alone, in the absence of a chemical analysis of blood, breath, or urine, are inadmissible to trigger the presumption provided by Section 316.1934... [14]

Thus, it is clear that the codified presumption is a legislative creature existing only through the Implied Consent Statutes which arises only when the test is admitted through the statute.

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[14] Williams v. State, 710 So. 2d 24 (Fla. 3d DCA 1998, reh'g denied, (June 10, 1998).

The appellate court ruling requires the State to resort to traditional methods of establishing a blood alcohol level. The non-statutory procedure cannot and should not give rise to a presumption of impairment that exists only if the results are obtained in accord with the statute. The trial court found, based on the evidence, that "adherence to the existing rules would not ensure a reliable result." (R. 624). The adequacy of the Rules is essential in order for the State to avail itself of the presumption, a codified presumption that exists only in the context of the Implied Consent Statutes.

Though this Court has yet to write an opinion on the certified issue, the Supreme Court of Louisiana has stated:

> When the legislature authorized the chemical analysis of a motorist's blood and created a statutory presumption of intoxication in the event that his blood contained the requisite percent of alcohol, it conditioned validity of the chemical test upon its having been performed according to the methods approved by the Department of Public Safety.

State v. Tanner, 457 So. 2d 1172 (La. 1984).

> This court has repeatedly recognized the importance of establishing safeguards to guarantee the accuracy of chemical tests in criminal prosecutions. In order for the state to avail itself of the statutory presumption of a defendant's intoxication arising from a chemical analysis of his blood under La. R.S. 32:662, it must show that the state has promulgated detailed procedures which will insure the integrity and reliability of the chemical test, including provisions for repair, maintenance, inspection, cleaning,

> certification, and chemical accuracy. It must also show that the state has strictly complied with the promulgated procedures.

State v. Rowell, 517 So. 2d 799, 800 (La. 1988), citing, State v. Grew, 403 So. 2d 1225 (La. 1981); State v. Goetz, 374 So 2d 1219 (La. 1979); State v. Graham, 360 So. 2d 853 (La. 1978). Thus, other courts have recognized that minimum requirements ensuring scientific reliability must be in place prior to the State availing itself of the presumption. Petitioner urges that this Court follow this logic.

CONCLUSION

The legislature has created a statutory scheme which, if followed, gives rise to a presumption of impairment. The scheme prescribes certain tests, and the results of any one of those tests may serve as the basis for the presumption. The results of some other test may not serve as a basis for the presumption. Section 316.1934 (2), *Florida* Statutes (1995). If, as the legislature states, a chemical analysis of a person's blood to determine alcoholic content "in order to be considered valid under this section must have been performed substantially in accordance with methods approved by the Department of Law Enforcement...", Section 316.1934(3), Florida Statutes (1995), it necessarily follows that an invalid test creates no presumption. Respondent might now use the same sample to attempt to prove alcoholic content, but the results of that testing procedure will not be and can not be the

results of one of the test afforded by Section 316.1932, 316.1933, or 316.1934. Those results will be from a different test, not one which gives rise to a presumption. Based on the foregoing arguments and authority, Petitioner respectfully requests that this Court answer the question certified as one of great public importance in the negative.

Respectfully submitted,

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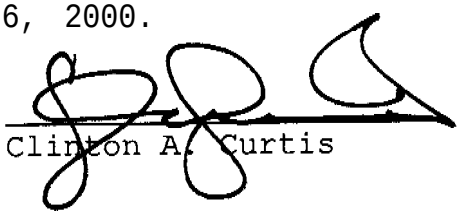
CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits has been furnished by regular U.S. mail delivery to Susan D. Dunlevy, Assistant Attorney General, 2002 N. Lois Ave, Suite 700, Westwood Center, Tampa, FL 33607-2367, John Kirkland, State Attorney's Office, P.O. Box 9000, Drawer SA, Bartow, Florida 33831-9000, this January 6, 2000.



Clinton A. Curtis