IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. **Case No. SC00-189**

EARL SANDT,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT AND NOTICE OF SIMILAR ISSUES

Upon the certified question in the instant case, which is identical to that presented in State v. Michael Randy Miles, Florida Supreme Court Case No. 95,490, the State, as Petitioner herein is adopting **verbatim** the **argument** portion of the Initial Brief in State v. Michael Randy Miles, now pending before this court as its argument in the instant case.

STATEMENT OF THE CASE AND FACTS

On November 27, 1996, Corporal T. B. McMullian, Jr. submitted his affidavit stating he is a traffic homicide investigator with the Florida Highway Patrol, and on September 20, 1996, investigated the instant accident. He determined that Appellee, driving a 1984 Crown Victoria vehicle, drove through a stop sign striking the vehicle driven by Randall Prinz and both passengers, Georgeanna Cobianco and Meadow Stickler were thrown through the right front window, resulting serious bodily injury to Georgeanna, and in the death of eight year old Meadow. The accident occurred on September 20, 1996 at approximately 10:30 p.m. Approximately two hours later at 12:28 a.m. on September 21, 1996, a blood sample was taken from Earl Sandt and thereafter was analyzed by Teresa Adams of the Florida Department of Law Enforcement revealing a blood alcohol reading of .18. (R. 4) On December 9, 1996, the State filed its two count Information charging Appellee with DUI Manslaughter, and Driving Under the Influence Causing Serious Bodily Injury. (R. 1-2) At an initial hearing, the State called Corporal Tim Bailey who testified he observed two things immediately that led him to believe that Appellee was under the influence, a moderate odor of alcohol coming from Appellee’s breath, and slightly red bloodshot eyes.

(R.39) Corporal Bailey testified that he advised Appellee of the implied consent law at 11:41 p.m. and obtained the first sample. (R. 40) Corporal Bailey obtained the assistance from a paramedic to obtain this blood sample and when asked “and were all statutory and administrative procedures followed based on your observations”, Corporal Bailey responded without objection “that’s correct”. (R. 41) Approximately 45 minutes later, Corporal Bailey asked Appellee for a second blood draw, after being advised of the implied consent law again, stating it is routine to request a second sample of blood after a period of time has elapsed after the first. (R. 42-43) On cross-examination, he said he observed the technician draw two vials of blood, indicating that the procedure for the submission of this blood test is to use a kit that is either provided by the corporal or the paramedics. The same procedure was performed exactly on the second sample as on the first; the vacutainer tubes are filled, put properly back into the kit and labeled. (R. 45)

On July 24, 1998, Appellee filed his “Motion to Suppress and/ or Motion in Limine to Exclude Blood Alcohol Test Results Based on the Inadequacy of FDLE Regulations”. (R. 51-56) Attached to this motion are the FDLE regulations in question (R.

57-59), and pleadings, and transcript of hearings held in State v. Darren S. Guth from the Ninth Judicial Circuit in and for Orange County, Orlando, Florida. (R. 60-200) The final order and opinion from an appeal from the county court to the circuit court of Orange County found that there was sufficient evidence to support the county court's findings regarding deficiencies inherent in the FDLE rules and that the deficiencies were inconsistent with the policies of Florida's Implied Consent Law. (R. 75-81) The circuit court opinion found that the county court's decision to deny the State the benefit of the statutory presumption and to require the State to establish a traditional predicate was appropriate but that the county court prematurely concluded that the defendant's right to due process had been violated. (R. 80-81)

Volume II of the instant record similarly contains further hearings in the Orlando case (State v. Darren Guth). (R. 202-307) At that hearing, both Roger Burr and Thomas Wood testified.

Volume III of the instant record continues the motion hearing in the Orange County case. (R. 308-427) Also included in the instant record is the Motion to Suppress or in the Alternative Motion in Limine to Exclude Blood Alcohol Test

Results Because of the Inadequacy of the FDLE Regulations filed in State v. Michael Randy Miles in Escambia County, Florida (R. 428-432) and the trial court order in that case. (R. 435-437) The opinion of the First District Court of Appeal in that case (State v. Miles) also appears in the instant record. (R. 505-509)

On August 10, 1998, the State filed its Motion to Strike Appellee's Motion to Suppress and or Motion in Limine to Exclude Blood Alcohol Test Results Based on the Inadequacy of FDLE Regulations alleging that Mr. Sandt failed to make any showing that the blood analysis in question was scientifically inaccurate or unreliable, or that the sample was tainted or that any approved procedures were not followed in the collection, storage, transportation or analysis of his blood and therefore he was without standing by failing to present a bona fide case or controversy. (R. 438-439) Attached to that Motion to Strike is the State's memorandum of law. (R. 440-463) On August 10, 1998, a hearing was held upon the State's Motion to Strike before the Honorable W. Douglas Baird, Circuit Judge. (R. 464-497) At that hearing, the State argued, in essence, that the State is entitled to the presumption, and the correct way to suppress the evidence would be to establish that the blood sample in this case

as a fact, is inaccurate or unreliable but since that argument was not contained in Appellee's motion, there is no genuine case or controversy. (R. 470) The State further argued that the rules FDLE promulgated to facilitate the Implied Consent scheme should be viewed in an administrative law sense as opposed to penal law. (R. 477) The court said that just because it is conceivable that there could be additional regulations or rules that would further assure the accuracy of the blood draw does not necessarily mean that the blood taken and tested is inaccurate. (R. 483-484) Counsel for Appellee said that the blood taken from Appellee was not tested for some days. (R. 486) The trial court advised counsel for Appellee that he could argue there was some procedure that was followed that would affect the accuracy of the blood alcohol analysis. (R. 487) Counsel for Appellee further urged that although anticoagulant is required, the amount is not specified, and the rules do not require a preservative. (R. 488) On August 11, 1998, the Honorable W. Douglas Baird entered his Order to Strike Appellee's "Motion to Suppress and or Motion in Limine to Exclude Blood Alcohol Test Results Based on the Inaccuracy of FDLE Regulations". (R. 498-499) In it, the court held that notwithstanding the existence of FDLE rules, the court would look to the evidence or lack thereof impacting on the

scientific accuracy or reliability of the blood tests at issue to determine their admissibility. The court went on to state in its order "to challenge the test results, the defendant must show that the State failed to substantially comply with FDLE rules, or, by competent scientific evidence and not speculation, that there was a procedure followed by the State that calls the scientific accuracy and reliability of the blood test into question". (R. 499)

On September 17, 1998, the prosecutor advised a different trial judge that initially Judge Baird had ruled in the State's favor but because of the opinion in Miles, the Appellee had renewed this argument. (R. 549) Appellee stated that his Motion in Limine or to Suppress was not case specific and that because of the First District Court of Appeal opinion in Miles, (infra) the rules themselves were insufficient on their face, failing to meet the requirements of the Implied Consent Law. (R. 545) The prosecutor urged that because the First District Court of Appeal in Miles did not address any facts; perhaps their opinion would have changed had there been facts provided. (R. 550)

The State called Paul Sauer who testified on the date in question he had been employed with the Florida Highway Patrol for 31 years, and that he took possession of the blood drawn by a

paramedic at the direction of Corporal Bailey. (R. 464-465) He identified the two kits that he received from Corporal Bailey in this case (R. 566-567), and took them to the Florida Highway Patrol Station after he left the scene of the accident. (R. 566-568) He was unsure if the highway patrol had a refrigerated unit in their evidence room at that time, but said if the refrigerator had been delivered prior to the date of the instant crash, he would have placed them in the refrigerator. (R. 570) The following Monday, he delivered the two kits to FDLE in Tampa. (R. 571)

Counsel for Appellee then called Dr. Richard Jensen. (R. 573) After stating his educational and professional background (R. 573-576) he indicated he had never published any articles or studies regarding analytical chemistry, or toxicology, as it related to ethel alcohol determination (R. 576) but then said that he has a patent on the transport and collection of biological fluids including blood so that he did indeed have a publication in that area. (R. 577) The court accepted him as expert in forensic chemistry and toxicology. (R. 578) Dr. Jensen said that the integrity of the blood sample is more important that the analysis itself. When asked about the collection, storage, transportation and the total integrity of

the sample, he indicated he had training and experience in those areas. (R. 580) He said that within the scientific community there were recognized and established principles and criteria to insure the integrity of samples for testing. (R. 581) Dr. Jensen was then accepted by the court as an expert on the standards of practices within the scientific chemistry community on insuring the integrity of blood samples. (R. 582-583) The doctor testified in general terms as to storage and decomposition of samples. (R. 583-590) He said that vials with a grey stopper commonly means they contain a preservative and an anticoagulant depending on the manufacture's ability to fill each one properly. (R. 589) He said it is important to have a program to test the contents of these tubes to ensure that all of them have a high probability of having the proper preservative and anticoagulant in the proper amount. He indicated the rule as it exists in Florida did not provide for any type of determination or random basis to determine the amount or nature of the anticoagulants or preservatives within the tubes that are used. (R. 590-591) He said the rules in question should speak to the presence, amount and nature of the anticoagulant and preservative. (R. 591) If there is insufficient anticoagulant micro clotting is a process that can occur. (R. 591-592) He also indicated that the

Florida Rules failed to describe the conditions in which the sample may be maintained or stored pending analysis. (R. 592) Dr. Jensen concluded that based on the core policy of the Implied Consent Statute, the rules in question were inconsistent therewith as they relate to reliability of testing. (R. 596) On cross examination Dr. Jensen indicated he is not qualified to conduct blood alcohol concentration analysis for use in criminal proceedings in the State of Florida nor does he have a license or a permit that would allow him to do so in Florida or in any other state. He was not familiar with the abbreviated predicate under Florida's Implied Consent Law but suggested that the prosecutor could explain it to him. (R. 597-598) The State explained that by establishing certain procedural steps had been taken a presumption of admissibility would be created. (R. 598-599) The doctor testified that approximately 99% of his practice over the last 15 years had been testifying for the defense and that he would probably be paid in the area of eight to nine thousand dollars for his testimony and work in the instant case. (R. 602-604) When asked if he had conducted any investigation with any of the individuals who handled blood samples from the point of collection through analysis in the instant case, he said earlier that day he asked Teresa Adams what kind of kit was used but that

would not impact on his opinion as to the sufficiency of the rule. (R. 605-606) He said scientists should be able to follow procedures without regulations because their education and training to perform tests establish the accuracy and integrity of a sample. (R. 609) The doctor then agreed that the FDLE rules are not the end all for the insurance of scientific accuracy and reliability but that are important to establish accuracy and reliability but everybody does it the same way. He also agreed to the importance of the training and experience of the personnel who are charged with implementing the rule. (R. 610-612) Dr. Jensen said that the manufacturers who make the grey stopper vacutainers have internal quality control procedures. (R. 622) Dr. Jensen also testified in response to the court's inquiries that if proper standards are employed, it could establish accuracy and reliability but even from laboratory to laboratory materials which are used properly will vary. (R. 624-625)

The State called Jennifer Hicks (R. 628), who testified that in September, 1996, she was employed by FDLE as a crime laboratory technician. (R. 629) She said her responsibilities were intake and custody of evidence and therefore when an item was brought to her she would document its receipt and put it in the chain of custody. (R. 629) She identified the two boxes

previously referred to by Sergeant Sauer. (R. 630) She said they were sealed upon her receipt, on September 23, 1996 and they were delivered to her by Sergeant Sauer in person. (R. 631) She said after the intake process, they were placed in the refrigerator in the evidence vault. (R. 632)

The State next called Corporal Bailey who testified as he had previously and referred to in this Statement of the Case and Facts hereinabove. (R. 634-647) He added that he did make a specific inquiry of the paramedic in this and all cases to determine that they are in fact qualified pursuant to FDLE regulations. (R. 642) He said he was aware that the kit provided had not expired and was valid at the time. The expiration was May, 1997 and the incident occurred in September, 1996. He observed the paramedic use a swab prior to obtaining the blood from Mr. Sandt and knew it to be a non-alcoholic antiseptic. (R. 643) He observed the blood from Appellee flow into the grey stopper tubes. (R. 644) He also observed the paramedic mark the tubes for identification and seal them in the container as well. (R. 644) He said the second blood draw was performed the same as the first. (R. 645-646) He then turned both blood draws over to Sergeant Sauer. (R. 647)

The State next called Gary McDow who testified he had been a

paramedic with the City of St. Petersburg Fire Department for 25 years. (R. 648) He responded to the instant crash, and was requested by Corporal Bailey to conduct a blood draw on Appellee. He said as a paramedic he is certified by the State of Florida, Department of Health and Rehabilitative Services, and is also in possession of FDLE certification. His certification that existed at the time was admitted into evidence. (R. 648-650, 541) He identified his name, the date and time on the kits admitted into evidence and the time each was taken. (R. 651-652) He said he checked to make sure the kit was not expired prior to using it. (R. 652) He said he used the non-alcoholic antiseptic swab that comes inside the kit to swab Appellee's arm. (R. 653) He said he is aware that the grey stopped tubes contain an anticoagulant and a preservative. He said he sealed them to prevent evaporation or entry of another substance. (R. 653-654) He said the second draw was taken in the same manner. (R. 655-657)

The State next called Teresa Adams who testified she is a senior crime laboratory analyst for FDLE in the chemistry and toxicology sections and has been employed in that capacity for 11 years in chemistry and for alcohol and beverage alcohol analysis for 9 years. She has a Bachelor of Science in Chemistry, a Master of Science in Forensic Science and has completed training

with FDLE as well. (R. 658) She said she has been permitted by FDLE to perform blood alcohol testing since February, 1991. A copy of her permit was admitted. (R. 659, 541-542) She said her permit has been current the entire time she has been with FDLE. (R. 660) She said her laboratory and testing proficiency is monitored. (R. 660-661) She was admitted as an expert in the field of clinical chemistry and forensic toxicology as it relates to blood alcohol content. (R. 661) She said she utilizes gas chromatography in analyzing blood samples for the presence of alcohol. (R. 661-662) She said this type of testing is accepted within the scientific community. (R. 662) She said that prior to running any case samples through the instrument, she first calibrates it using a series of known levels of ethel alcohol for calibration. Upon completion of the calibration, she said it is further verified using controls which are known levels of ethel alcohol either in water or blood to verify the instrument is working correctly. (R. 664) She said throughout the case samples, further controls would be run again to verify that the instrument is working correctly. At the end of the test of a case sample, the control is run again to prove that the instrument and calibration is good at its conclusion. (R. 664) She said their standard operating procedure is that any type of

blood evidence has to be refrigerated upon receipt. (R. 666) She said a forensic technologist gave her the kits on September 24, 1996 and based on their standard operating procedure, they would have been retrieved from the refrigerator in the vault. (R. 667) They were still sealed at that time. (R. 667) She said at the time she opened the kit, all the seals on the blood sample tubes were intact and suitable for testing. The actual analysis was performed by her on September 28, 1996. She said everything was placed back in her locked refrigerator on the 24th prior to the actual testing. (R. 669) She said all of the kits that she had been using since 1991 always had a preservative and anticoagulant. (R. 671) She said the instant samples appeared to be unclotted and in good condition. (R. 672) She said in order for blood to begin to decompose, no preservative would be used or it would not be drawn properly; she said a foreign body could cause the sample to decompose which would be some sort of bacteria. She said in looking at these samples prior to testing, there was no indication that any decomposition occurred. (R. 674) She said however when blood does start to decompose, it would decrease the amount of alcohol in the blood. (R. 675) She asked if she heard Dr. Jensen indicate it was possible for a sample to actually increase blood alcohol content as a result of

decomposition, she said it was a possibility but she did not know what percentage of a possibility it was. (R. 675) She said the results on the first report was .20 grams of ethel alcohol per 100 milliliters of blood and the second kit was .18. (R. 676) She said the tubes in the instant case contained preservative of sodium fluoride and she thought it was 100 milligrams. When asked on cross examination if there were different amounts of preservatives for different types of tubes depending on their use, she said she never saw tubes outside of a blood collection kit but did not see why they would not have different amounts, although she did not know. (R. 678) She said the anticoagulant in the instant tubes was potassium oscillate and again the type and amount selected were determinations made by the manufacturer. (R. 679) She said there was nothing independently done that she was aware of by her lab that would test these tubes to make sure they met some standard. (R. 679)

The State next called Tom Wood who stated he is a senior crime laboratory analysis with FDLE and has been so employed since 1974, and has been in the alcohol testing program since 1993. (R. 680) He says he administers the blood alcohol permitting proficiency testing program, and manufactures stock solution, and serves as a gatekeeper for vendor manufactures used

to check the calibration of breath testing instruments for the entire State of Florida. (R. 681) He has testified as an expert in 390 cases. (R. 682) He has been qualified as an expert in drug chemistry associated with alcohol testing. He has testified in that capacity approximately 74 times and has been qualified as an expert in blood alcohol analysis, the rules associated with blood alcohol analysis, in analytical chemistry and as an expert on breath testing instruments. (R. 682) The court admitted Mr. Wood as an expert on the FDLE regulations, blood analysis, and analytical chemistry after the court questioned him in these three areas as well. (R. 685-686) He said assurance of reliable scientific evidence for use in future court proceedings is a core policy of the program he oversees. (R. 688-689) He said the FDLE Rules derive their authority from the statute and their role is to add details to the broad mandate provided by the legislature. (R. 689) He said Rule 11D-8 of the Florida Administrative Code requires that an analyst who may hold a permit must be either a physician or licensed clinical laboratory technologist, supervisor or technician, or be a analytical chemist and it goes on to describe the criteria they must meet. (R. 690) He said the rules simply says that blood will be collected in a container or vial; he testified the department

could have written at great length the kind of stopper, but they took advantage that grey stopper tubes are universally associated with alcohol analysis so no more was said. (R. 694-695) He said at different points on a continuum there are rules, statutes implementing instructions, common sense, and the standards of the forensic science community. (R. 695) He said the statute is very broad and says the department will devise a means for providing accurate and precise reliable results. The department in turn writes rules that provide more detail aiming in that direction and then an analyst such as Teresa Adams would have procedures in more detail than what the rule would call for. (R. 695) He says his input in rule changes as a senior crime laboratory analyst is to offer scientific and technical advice, but when the rules are being revised, the department also seeks the voice of others within the analytical community. (R. 696) Mr. Wood says he knows Dr. Jensen and met him in a courtroom but he had never come to Mr. Wood's agency to review the rules, implementing instructions, or operating procedures. He said Dr. Jensen never has communicated to FDLE any proposed change in the rules. (R. 697-698) Mr. Wood testified he himself has proposed some drafts of rule changes not yet acted on in response to changing standards. (R. 698-699) He said the rule as it is

currently written however does assure scientific accuracy and reliability. (R. 699) He said his new proposals for rule changes are simply an articulation of how it is done today, putting their operating procedures currently employed into the rule. (R. 703-704) He said right now the rule does not specify that the vial be made of glass, and its possible that the rule should so specify but FDLE did not think so. Mr. Wood went on to state that it comes back to remaining within the confines of the statute and the authority granted to FDLE by the legislature; he said when the rule is written they deal with the system that's in place. Mr. Wood went on to explain "the universal standard for blood alcohol sample collection device is the grey stopper tube. It contains anticoagulant and preservative. We don't need to emphasize the obvious, so to speak. If this was cutting edge technology then perhaps we would write something about it, but it is not. We are drawing on decades of practice." (R. 706-707) He said the kits that are provided by Lynn Pevey Laboratories (as the one in the instant case) are relied upon by FDLE. They know that there is a preservative and an anticoagulant in a particular type and amount in those tubes. He said FDLE does not do any independent testing of those tubes, he said they depended on the near universal acceptance of grey stopper tubes for blood alcohol

analysis. He said the manufacturers also read the medical journals and are aware of what the scientific community is looking for. (R. 719) He agreed that in the Miles case he testified "it is not necessary to provide a methodology for handling blood samples until such time it is tested because the principles of proper handling, transportation and storage of blood are universally known." (R. 720) He said on redirect examination that the current rules are not meant to be interpreted in a vacuum, but assume good science. (R. 720-721) When asked if in terms of the rule in question, the analyses that have been performed pursuant to that rule in his experience have had any of the problems presented by the Appellee, Mr. Wood responded that he was not sure if Appellee had presented any particular problem.

The State next called Richard Karrol who testified he is a lieutenant with the Florida Highway Patrol, and that in September, 1996 they had a refrigerator used for storage of evidence including blood samples taken at crime scenes. (R. 724-726)

The State argued that Appellee had shown nothing wrong with the particular sample and was merely attacking the rules. (R. 728-729)

On March 9, 1999, the trial court entered its order granting in part, denying in part, defendant's Motion to Suppress and/or Motion in Limine. The trial court concurred with the determination made at the circuit court level in State v. Townsend, supra, find that the FDLE rules are not adequate and do not comply with the core policies announced in State v. Bender, infra. The court ordered that Appellee's motion to suppress would be denied, and if the State proved the traditional scientific predicate, the blood test would be admissible, but the State would not be entitled to jury instructions on the statutory presumption of accuracy under Section 316.1934, Fla. Stat. per Robertson v. State, 604 So.2d 783, 790 (Fla. 1992). (R. 503-504) Ten days later on March 19, 1999, the State timely filed its notice of appeal from that order.

On January 19, 2000, the Second District Court of Appeal issued its opinion following State v. Miles 732 So. 2nd 350 (1st DCA) review granted, 740 So. 2d 529 (Fla. 1999),and holding the State would be entitled to the statutory presumption only after laying the three pronged predicate described in State v. Bender, 382 So. 2nd 697 (Fla. 1980), and certifying the following 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. 2nd 783 (Fla. 1982), thereby establishing the scientific reliability of the blood-alcohol test results, is the state entitled to the legislatively created presumptions of impairment?

On January 21, 2000, Petitioner filed its Notice to Invoke This Court's Jurisdiction, and on February 2, 2000 this Court issued its order postponing decision on jurisdiction and briefing schedule.

SUMMARY OF THE ARGUMENT

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

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

As, Judge Wolf's dissent in Miles pointed out, Bender

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

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

ARGUMENT

CERTIFIED QUESTION[1]

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

The majority of the DCA panel essentially affirmed the trial court's declaration of the FDLE rules as unconstitutional on the due-process ground that they fail to adequately specify means to preserve blood samples. The certified question assumes the fatal constitutional infirmity of the FDLE rules.

The State contends that the ruling of the trial court, as a matter of law reviewed on appeal de novo without any deference to the trial court,[2] was erroneous and that the DCA majority opinion affirming it was also. As a matter of law, the trial court and the majority of the DCA panel did not afford the proper deference to Chapter 316, Fla. Stat., and the FDLE rules. Respondent bore

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[1] 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").

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

the burden of showing that FDLE's rules were "clearly erroneous." Compare Pan American World Airways, Inc. v. Florida Public Service Com'n, 427 So.2d 716, 719 (Fla. 1983) ("administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to **great weight** and should not be overturned unless **clearly erroneous**")[3] with Robertson v. State, 604 So.2d 783, 789 n. 6 (Fla. 1992) ("defense might challenge the HRS regulations themselves as being scientifically unsound, but the **burden would rest on the defense** to prove this point").[4] Respondent did not meet his burden for several reasons.

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

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

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

ISSUE I

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

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

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

The excluded "presumption" at issue here is actually a permissive inference that is the functional equivalent of evidence of impairment. Depending on the level of alcohol, this evidence of impairment is simply one fact to be considered with others or can be, alone, probative enough to overcome a motion for judgement of acquittal on the element of impairment. See State v. Rolle, 560 So.2d 1154, 1156 (Fla. 1990) (discussing blood alcohol levels as "evidence relevant to impairment" and "prima facie evidence" of impairment). As such, the basic

question is whether there is "'**no** rational way the trier [of fact] could make the connection permitted by the inference," 560 So.2d at 1156, quoting County Court v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979).[5]

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

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

In situations without the subject's explicit consent,

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

FLORIDA STATUTES limit law enforcement to:[6]

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

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

FDLE RULES require:

- Analysis of the blood sample through "Alcohol Dehydrogenase" or "Gas Chromatography," Fla. Admin. Code R.

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

11D-8.011;

- Blood sample vials or tubes labeled with the "Name of person tested," "Date and time sample collected," "Initials of personnel collecting the sample," Fla. Admin. Code R. 11D-8.012(1);
- Any "[c]leansing of the person's skin in collecting of the blood sample ... with a non-alcoholic antiseptic solution," Fla. Admin. Code R. 11D-8.012(2);
- "Blood samples ... be collected in a vial or tube" that contains "an anticoagulant substance," Fla. Admin. Code R. 11D-8.012(3);
- The vial or tube to be "stoppered or capped to prevent loss by evaporation," Id.;
- The analyst to have been permitted through Fla. Admin. Code R. 11D-8.013 and 11D-8.014, which impose very detailed requirements, including, for example,

-detailed assurances pertaining to the accuracy of the analytical procedure,

-detailed proficiency testing, and

-prerequisite training through specified licensing or through education; and,

- The analyst to maintain proper records and several other

prerequisites specified in Fla. Admin. Code R. 11D-8.015.

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

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

- "otherwise admissible," §316.1934(2), Fla. Stat., **STANDARD RULES OF EVIDENCE** concerning the preservation and transportation of evidence address the concerns of the trial court, if and when those concerns materialize in an actual case. Here, **CASE LAW REGARDING CONTAMINATED EVIDENCE** is bountiful and available to defendants upon a proper showing by them. See, e.g., Terry v. State, 668 So.2d 954, 959 n. 4 (Fla. 1996) (blood sample; "we ... find no 'indication of probable tampering with the evidence' to support appellant's claim that there was a break in the chain of custody"; defense's bare allegation, insufficient); Parker v. State, 456 So.2d 436, 443 (Fla. 1984) (rejected defense attack on

break in chain of custody; "Nothing in the record shows evidence of tampering"); Peek v. State, 395 So.2d 492, 495 (Fla. 1981) (hair comparison analysis); Ehrhardt, Florida Evidence §901.3 Chain of Custody ("Where no evidence of tampering is introduced, a presumption of regularity supports the official acts of police officers"). See also Taplis v. State, 703 So.2d 453 (Fla. 1997) ("once evidence of tampering is produced, the proponent of the evidence is required to establish a proper chain of custody or submit other evidence that tampering did not occur"; harmonizing two DCAs' cases).

The availability of this case law obviates a "monster" set of rules, yet affords protection against unreliable evidence.[7] Jordan v. State, 707 So.2d 816 (Fla. 5th DCA 1998), result approved on other ground 720 So.2d 1077 (Fla. 1998), correctly applied this principle to blood alcohol test results in upholding the admissibility of the blood alcohol result because the **defense failed to meet its burden**: "Jordan failed to establish

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

a probability of tampering with her blood sample."[8]

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

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

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

Although unnecessary for the resolution of the issue, FDLE's

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

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

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

> As is clear from the cases, one who discovers he was tested with an inaccurate machine or a machine whose accuracy is suspect because of the way the machine was checked for accuracy and reproducibility **can attack admission of the test results in his case or the applicability of the statutory**

> **presumptions on which the state relies**. Similarly, one presumes a **diabetic who produces acetone metabolically can attack the reliability of the test result in his case** if the machine used does not discriminate between alcohol and acetone. Notwithstanding the foregoing, one cannot claim discriminatory treatment if one was not unfairly treated, **merely** because it is **possible** someone was unfairly treated.

609 So.2d at 618. Thus, the rules need not be all-encompassing to provide a threshold for admissibility and the applicability of the "presumption." Accord State v. Berger, 605 So.2d 488, 491 (Fla. 2d DCA 1992) ("entire administrative scheme sufficiently ensures the reliability of results even though it does not set forth specific standards with reference to monthly and annual inspections") approved Veilleux v. State, 635 So.2d 977, 978 (Fla. 1994) citing Mehl v. State, 632 So.2d 593 (Fla. 1993).[9]

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

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

majority panel of the DCA ignored these existing protections.

Here, similar to Rochelle's example of the **possibility** of a diabetic confounding test results, speculative factors pertaining to preservation **may affect** the result in any given case, but, such factors are not grounds for striking down the permissive inference. See also Wissel v. State, 691 So.2d 507, 508 (Fla. 2d DCA 1997) ("attack, based on the lack of a rule or regulation to cover every step of the testing procedures for breath test instruments, is not only speculative and theoretical, but also hyper-technical"). Cf. L.B. v. State, 700 So.2d 370, 372 (Fla. 1997) ("We may assume, for the sake of argument, that in some **peripheral cases** it may not be clear whether a particular pocketknife is a 'common' pocketknife ... insufficient to strike a statute as unconstitutionally vague") Indeed, a coup de grace of the trial court's and the DCA-majority's position is that there was **no evidence of actual, specific unreliable blood alcohol results in Florida due to a lack of rules**. Instead, there were only **possibilities** "based upon" categorical aspersion upon Florida police officers by an out-of-state defense expert who, "once upon a time", "**may have** read" (II 272) pertinent Florida statutes.

The impact of **possible** problems are thus academic, and, as

such, they should not be the basis for excluding the permissive inference provided pursuant to the patent legislative intent of strictly enforcing Florida's DUI laws. See, e.g., §316.193 and its extensive legislative history (penalty section for DUI). A fortiori, here, the blood testing procedures involve the death of another human being, i.e., DUI Manslaughter, and injury to two other human beings, i.e. DUI Causing Personal Injury.

In summary, the trial court's exclusion of the permissive inference, and therefore the majority-panel of the DCA's affirmance of it, exalt academic possibilities in one narrow area over real-world practices and thereby exalt form over substance. In the words of the legislature, any topics missing from the rules are "insubstantial" in Florida, §316.1934(3) ("substantially in accordance with"; "Any insubstantial differences ..."). See also §316.1933(2)(b), Fla. Stat. ("Any insubstantial differences ..."); §316.1932(1)(f)1 ("substantially in accordance with"). There was no due process violation.

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

As indicated above, a permissive inference is the functional equivalent of evidence that the jury may consider. It is well-settled that there is a distinction between the threshold for

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

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

coverage) could affect the result. Here, unless Respondent shows that the factors are especially problematic and unexplained[10] **in his case**, under Miller, even some actual deterioration in the blood merely affects the weight of the evidence; it does not exclude it. See State v. Bender, 382 So.2d at 699 (Fla. 1980) (after State satisfies statute and rules, "fact finder may presume that the test procedure is reliable" and apply "presumption," but "[t]he presumptions are rebuttable, and a defendant may in any proceeding attack the reliability of the testing procedures" and "the presumptions" regarding impairment); U.S. v. Brannon, 146 F.3d 1194 (9th Cir. 1998) (incomplete breath sampling, although not recommended in scientific literature and lowering reliability of the tests, admissible and subject to cross-examination; all scientific testing "known to humanity is subject to error").

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

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

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

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

This Court in State v. Rolle, 560 So.2d 1154, 1156 (Fla. 1990), recognized County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), as a leading authority on permissive inferences. Allen, 442 U.S. at 157-60, 99 S.Ct. at 2224-26, distinguished a "mandatory presumption," which "tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." For a mandatory presumption, constitutional validity is determined on the face of what the jury is told, not the evidentiary facts of the case, See 442 U.S. at 159-60. In contrast to a mandatory presumption, the constitutional validity of a permissive inference depends upon

the evidence in particular case under review, and the challenger of the inference bears the burden of "demonstrat[ing] its invalidity as applied to him":

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

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

This burden on the opponent of a permissive inference to attack it comports with the discussions of the rules on their face (Section A supra) and the weight of the evidence (Section B

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

Marcolini v. State, 673 So.2d 3 (Fla. 1996), discussed inferences at length, quoted the DCA's reliance there upon Allen, and agreed with the DCA's reversal of a trial court order striking down a portion of Section 812.14, Fla. Stat. The statutory provision authorized a finding of a prima facie violation (there, Theft of Electricity) of that section upon proof of a "diversion or use of the services of [the] utility" under certain circumstances. This Court agreed with the DCA,

which had held that the statute created a permissive inference, requiring an as-applied analysis, which looks to the specific facts of the case under review to determine if it is "more likely than not" that the inferred fact flows from the proved facts.

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

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

- "the sample was drawn in mid-December and the analysis was conducted in early January", that is, in "**winter**", thereby reducing and perhaps eliminating any possible effects of

heat;[11]

- the sample was "contained in a **stoppered tube**"
- the stoppered tube "contained an **anticoagulant and a preservative**".

Accordingly, the FDLE analyst testified, for example:

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

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

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

The DCA erroneously affirmed the trial court's exclusion of

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[11] Although the instant sample was drawn in mid September, it was refrigerated. (R4, 570, 666, 669, 724-726)

the permissive inference and erroneously recognized the significance of the facts of a case too late by placing the burden on the State to prove the common law "three-pronged predicate described in *Bender*." Once the State shows compliance with Chapter 316 and FDLE rules (not Bender's three prongs), the burden should be on the defendant to show unreliability. The DCA compounded its error by imposing the burden on the State to prove three "prongs" (reliability, qualified operator and proper equipment, and expert interpretation), where the supposed deficiency pertained to only one aspect (preservation) of only one them (reliability), thereby further ignoring existing statutes and rules on the qualifications of the operator, prerequisites to proper equipment, and the meaning of the result regarding permissively inferred non-impairment (.05 or less) or impairment (.08 or more).

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

D. State v. Bender, 382 So.2d 697 (Fla. 1980), controls.[12]

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

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

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

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

administrative rules enacted by its authority," 382 So.2d at 699.

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

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

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

ISSUE II

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

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

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

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

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

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be rephrased, the decision of the majority of the District Court of Appeal panel should be disapproved, and the Order entered in the trial court should be reversed with instructions to the trial court, upon proper defense motion, to conduct a full evidentiary hearing pre-trial or at-trial in which the State would be afforded the opportunity to show its substantial compliance with applicable provisions of Chapter 316 and FDLE rules, and if it meets that burden, the defense would be afforded the opportunity to establish the unreliability of the blood alcohol test under the facts of this

case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the INITIAL BRIEF OF PETITIONER ON THE MERITS has been furnished by U.S. Mail to Ronnie Crider, Esquire, 1550 South Highland Avenue, Clearwater, Florida 33756, this _____day of February, 2000.

_____
ERICA M. RAFFEL
COUNSEL FOR PETITIONER