IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ANTHONY T. BODDEN, Respondent.	Case No. SC03-622 Second DCA Case No. 2D01-3535

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, The State of Florida, was the prosecution in the trial court and Appellee in the Second District Court of Appeal of Florida. Respondent, Anthony T. Bodden, was the defendant in the trial court and the Appellant in the Second District Court of Appeal. The symbol “R” designates the original record on appeal, including the transcript of the hearing on the motion in limine before the county court and the deposition of Dale Livingston.

STATEMENT OF THE CASE AND FACTS

On August 7, 2000, police issued Respondent a traffic citation for driving under the influence pursuant to Florida Statutes section 316.193. (R. at 4.) In the criminal report affidavit, the attesting officer stated that he responded as back-up to a another officer conducting a traffic stop of Respondent. (R. at 7.) The officer noticed that Respondent had red eyes, slurred speech, and swayed while he stood. (R. at 7.) He also noticed an odor of alcohol on Respondent's breath. (R. at 7.)

The officer read Respondent the implied consent warning and Respondent agreed to a breath test. (R. at 7.) The results of the breath test revealed that Respondent's blood alcohol level was .060 and .065. (R. at 5.) Police searched Respondent and found less than 20 grams of marijuana in his pocket, as well as a marijuana pipe and rolling papers. (R. at 7.) The State filed an information and charged Respondent with one count of driving under the influence, one count of possession of cannabis, and one count of possession of drug paraphernalia. (R. at 8.)

On February 7, 2001, Respondent filed a motion in limine regarding defendant's urine test and urine test results #1 and motion in exclude regarding defendant's urine test and urine

test results #2. (R. at 11, 14.) In the motions, Respondent asked the court to limine any reference to his urine test results because no regulatory criteria had been promulgated to insure the reliability of the urine testing procedure. (R. at 14.)

The court held a hearing on the motions on April 6, 2001. The defense stipulated that Respondent submitted to a urine test and the results were positive for a controlled substance. (R. at 32.) The State also stipulated that had Marcia Barnhart, a State witness in the instant case, testified about the procedures used to test urine in Florida, it would be the same as the deposition of Dale Livingston taken in a different case. (R. at 31.) Dale Livingston's deposition is part of the record on appeal. The deposition was taken in the case of State of Florida v. Michael Pacheco.

In the deposition, Mr. Livingston testified that he works at the Florida Department of Law Enforcement Crime Laboratory (FDLE) in Tallahassee. (R. at 113.) He has been qualified as an expert in several circuits and has testified in 12 to 20 cases dealing with urine, drugs, and DUI in the last few years. (R. at 130.)

The analysis he performs is semi-quantitative in nature. (R. at 130.) The procedures that he runs on blood and urine

for drug determinations or drug analysis are controlled to the point that he can determine an approximation of the drug in the sample. (R. at 130.) However, he stated that it can be very difficult to determine precisely when the drug was taken. (R. at 131.) Based on rates of elimination of drugs from the body, he can make broad estimates of how long drugs will stay in the person's system after they have stopped taking them. Id.

Mr. Livingston stated that there are situations where he could have an opinion about whether the person was under the influence of the drug at the time of arrest. (R. at 132.) However, that would be an exception rather than the rule. Id. He further stated that based on his knowledge and understanding of pharmacology and toxicology, he did not think one could take a drug concentration from a urine sample and extrapolate a degree of impairment. (R. at 135.) That information is evidence of drug usage, not necessarily drug impairment. (R. at 136.) The mere presence of a drug in a urine sample by itself does not prove impairment. Id.

As to the procedures for testing urine samples, Mr. Livingston testified that there is a written procedure. As senior analyst in the Tallahassee section and as part of the written protocol for FDLE, it is his responsibility to

maintain the methods manual in the lab. (R. at 139, 140.) This procedure has not been published in Administrative Law Weekly or promulgated in accordance with the Administrative Procedures Act. (R. at 140.) Mr. Livingston stated that it had not been promulgated because there was no requirement. (R. at 140.)

Mr. Livingston wrote the procedure and it is used by the Tallahassee toxicology lab, which consists of four other analysts. (R. at 138.) He adapted the procedure from published procedures, but his particular procedure has not been published. (R. at 137, 138.) The main steps in the testing procedure involves hydrolysis of the glucuronide conjugates that are in the urine sample, an extraction and derivation step, and an analysis on the GC mass spec. (R. at 137.) The difference between what he does in the lab and what most of the published procedures do is that he uses a full scan mass spectrum on the identification rather than selected icon monitoring, a common method used in urine testing programs. Id. Mr. Livingston believed that the full scan gave more accurate results. Id.

Mr. Livingston stated that it is common practice to take a procedure that has been developed elsewhere and adapt or modify it for use in your own lab. (R. at 138-139.) The basic

concepts, methods, and techniques, are not novel and they have been published and peer reviewed in literature. (R. at 139.) As far as Mr. Livingston knew, other laboratories had not adapted the procedure. (R. at 138.)

Mr. Livingston also testified to the specific testing he performed on Michael Pacheco's urine sample and the results obtained from the testing. In urine and drug analysis, a normal batch of samples includes a spiked standard of 200 nanograms per milliliter, another spiked control at 20 nanograms per milliliter, and a urine blank. (R. at 143.) The extractions are done in the lab and once complete, they are loaded on the mass spectrometer to run the experiment. (R. at 144.) Unlike with blood alcohol concentration, Mr. Livingston checks only to see if the substance is present. (R. at 145.)

Michael Pacheco's urine tested positive for cocaine. (R. at 164.) Mr. Livingston could not say when Mr. Pacheco took the cocaine or whether he was impaired at the time of his arrest, but it was his opinion that the level of concentration of cocaine would have an effect on his body. (R. at 167, 168, 169.)

Mr. Livingston testified that his understanding of the implied consent rule is that the approval requirement is specifically for the breath testing and the alcohol testing.

(R. at 177.) He stated that there was no requirement in the administrative rule for any approval of drug testing procedures for urine or blood. Id. FDLE formulated a protocol used by all labs for the testing of urine samples. (R. at 1791, 181-182.) The final draft was not subject to rule promulgation. (R. at 183.)

As to the argument in support of the motion in limine, the defense contended that the urine test results should be limited for three reasons. One, the urine testing procedures are not considered an approved test. (R. at 34.) Two, the procedures used to test the urine were never promulgated in accordance with the Administrative Procedures Act. (R. at 34.) Three, FDLE's procedures unlawfully usurp the discretion of the State Attorney's Office. (R. at 35.) The defense also argued that the State cannot rely on implied consent because there was no rule. (R. at 42.)

The State argued that the term "approved test" does not apply to urine. (R. at 70.) Since there does not have to be an approved test for urine, the State submitted that it would not argue presumptions in urine. (R. at 72.) In addition, since the statute does not mandate a rule for urine tests, the State argued that suppression was an inadequate remedy. (R. at 73.) The State also contended that there was no invalid delegation

of authority by FDLE because the statute does not delegate authority to FDLE. (R. at 74.) Finally, the State argued that even if a rule was necessary, the State should be allowed to introduce the evidence of the test results through the traditional predicate.

The court reserved ruling on the motion. (R. at 97.) The county court entered an Order Granting Defendant's Motion in Limine regarding Defendant's Urine Test and Urine Test Results. (R. at 17.) The next day, on June 29 2001, the county court entered an Amended Order Granting Defendant's Motion in Limine regarding Defendant's Urine Test and Urine Test Results. (R. at 19.) In the order, the county court certified the following question of great public importance to the Second District Court of Appeal, pursuant to Florida Rule of Appellate Procedure 9.160:

> IN ADMINISTERING FLORIDA'S IMPLIED CONSENT LAW, IS THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT REQUIRED TO ADOPT RULES IN ACCORDANCE WITH THE FLORIDA ADMINISTRATIVE PROCEDURES ACT GOVERNING THE COLLECTION, PRESERVATION, AND ANALYSIS OF URINE SAMPLES OBTAINED BY LAW ENFORCEMENT PURSUANT TO FLORIDA STATUTE 316.1932(1)(a)?

The State filed a timely notice of appeal with the Second District Court of Appeal on July 11, 2001. (R. at 21.) Subsequent to the notice of appeal, the court entered a Second Amended Order Granting Defendant's Motion in Limine Regarding

Defendant's Urine Test and Urine Test Results on October 12, 2001. (R. at 25.)

On October 30, 2002, the Second District Court of Appeal entered an opinion affirming the county court's order. In the opinion, the Second District concluded that a urine test taken pursuant to implied consent must be "approved" in order to be admissible. The Second District also concluded that because Respondent's consent to the test was involuntary, the State could not use the traditional rules of admissibility in order to admit the urine test results.

On or about November 12, 2002, Petitioner filed a Motion for Rehearing, Rehearing En Banc, or in the Alternative, Motion for Certification. The Second District granted Petitioner's Motion for Certification on March 28, 2002. On April 3, Petitioner filed a Notice to Invoke this Court's Jurisdiction.

SUMMARY OF ARGUMENT

The Second District Court of Appeal erred when it affirmed the county court's order granting the motion in limine. The clear and unambiguous language in section 316.1932(1)(a)(1) suggests that a urine test conducted pursuant to implied consent does not require a rule promulgation under the Florida Administrative Procedures Act. Furthermore, neither in section 316.1932 nor any other related section of the Florida Statutes is there language which gives the Florida Department of Law Enforcement authority to promulgate rules for urine tests. Finally, the Second District also erroneously disallowed the State to introduce the evidence of Respondent's positive urine test result into evidence under the traditional rules of admissibility. Petitioner respectfully asks this Court to answer the certified question from the Second District Court of Appeal in the negative and reverse the Second District's opinion affirming the county court's granting of the motion in limine.

ARGUMENT

ISSUE

IN ADMINISTERING FLORIDA'S IMPLIED CONSENT LAW, IS THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT REQUIRED TO ADOPT RULES IN ACCORDANCE WITH THE FLORIDA ADMINISTRATIVE PROCEDURES ACT GOVERNING THE COLLECTION, PRESERVATION, AND ANALYSIS OF URINE SAMPLES OBTAINED BY LAW ENFORCEMENT PURSUANT TO FLORIDA STATUTE 316.1932(1)(a)?[1]

The county court granted Respondent's Motion in Limine Regarding Defendant's Urine Test and Urine Test Results and certified a question of great public importance to the Second District Court of Appeal. The Second District affirmed the county court's ruling, but granted Petitioner's request to certify the question to this Court. Petitioner submits that this Court should answer the question in the negative and conclude that Florida Statutes section 316.1932(1)(a)(1) does not require the Florida Department of Law Enforcement (FDLE) to adopt rules in accordance with the Florida Administrative Procedures Act (APA) as it relates to the collection, preservation, and analysis of urine samples.

The order under review is an order granting a motion in limine which, in effect, suppressed Respondent's urine test results. A suppression ruling comes to the reviewing court

[1] This is the question certified by the county court in its order dated June 29, 2001.

clad in a presumption of correctness as to all fact-based issues, and the proper standard of review depends on the nature of the ruling in each case. State v. Glatzmayer, 789 So. 2d 297, 306 (Fla. 2001). Since the Second District's holding presents a question of law only, it is subject to de novo review. Id. at 306, n.7. Applying the de novo review standard, this Court should find that the Second District's decision must be reversed for several reasons.

In this case, law enforcement stopped Respondent's vehicle based on the suspicion that Respondent was impaired. Respondent submitted to a breath test and his results were .060 and .065, below the legal limit for impairment. (R. at 4.) Police then read Respondent the implied consent warning and asked Respondent to submit to a urine test. FDLE tested the urine in accordance with their internal operations manual and concluded that the sample was positive for cannabis. (R. at 32.)

The Second District's certified question limits the issue in this case to whether FDLE must adopt rules in accordance with the APA when testing urine under the implied consent law. The Second District's decision to answer the certified question in the affirmative was erroneous for three reasons. One, the Second District incorrectly concluded that the term

"approved" in Florida Statutes section 316.1932(1)(a)(1) applies to "a urine test for purposes of detecting the presence of chemical substances ...or controlled substances." Two, the Second District mistakenly concluded that Florida Statutes section 316.1932(1)(a)(1) gives FDLE authority to promulgate rules with respect to urine testing. Three, the Second District erroneously concluded that the implied consent law makes urine test results inadmissible as a scientific test pursuant to the traditional rules regarding the admissibility of evidence. Petitioner reiterates the State's arguments below and contends that Respondent's urine test results are admissible even though FDLE's urine testing procedures have not been formally adopted as a rule.

A. The Clear and Unambiguous Language in Florida Statutes Section 316.1932(1)(a)(1) Demonstrates that a Urine Test Conducted Under Implied Consent Does not Need to Be Approved Under the APA.

In making its finding, the Second District erroneously concluded that Florida Statutes section 316.1932(1)(a) was ambiguous and capable of different constructions. This Court has repeatedly held that the plain meaning of statutory language is the first consideration of statutory construction. Jones v. State, 813 So. 2d 22 (Fla. 2002). When the language of the statute is clear and unambiguous and conveys a clear

and definite meaning, the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). A reviewing court is without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications and to do so would be an abrogation of legislative power. Id. Applying that standard here, the language of section 316.1932(1)(a)(1) is clear and unambiguous and should be given its plain meaning.

The officer in this case requested a sample of Respondent's urine pursuant to Florida Statutes section 316.1932(1)(a)(1). That subsection states the following:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to **an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath, and to a urine test for the purpose of detecting the presence of chemical substances as set forth in s. 877.111 or controlled substances**, if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages, chemical substances, or controlled substances.

§ 316.1932(1)(a)(1), Fla. Stat. (2000) (emphasis added). The language in this statute shows that when a person in Florida accepts driving privileges, he or she gives implied

consent to two different tests. One is an approved chemical or physical test for the purpose of determining the alcoholic content of his or her blood or breath. The other is a urine test for the purpose of detecting the presence of chemical or controlled substances.

The word “and” operates as a conjunctive only in the sense that implied consent subjects a person to the possibility of taking a breath test, blood test, urine test, or a combination, such as in this case where Respondent took a breath test and a urine test.

The comma which precedes the words “urine test” shows that section 316.1932(1)(a)(1) should be read as two sentences. Under the rule of grammatical construction, a qualifying phrase is read as limited to the last item in a series when the phrase follows that item without a comma. Edgewater Beach Owners Ass’n, Inc. v. Walton County, 833 So. 2d 215 (Fla. 1st DCA 2002). In this case, where there is a comma, the qualifying phrase “approved chemical or physical test” is limited only to the words preceding the comma. Thus, the term “approved physical or chemical test” does not modify the words “urine test.” If the Legislature had intended for urine tests to be “approved,” one would expect that the language in the statute would have stated that a person who

accepts driving privileges in this State gives their implied consent to an "approved urine test." By reading the plain meaning of the statutory language, it is clear that the term "approved" does not apply to urine tests.

Even if this Court concludes that the statute in question is ambiguous, two rules of statutory construction demonstrate that the Florida Legislature did not intend to require rule promulgation in accordance with the APA for urine testing. First, when interpreting a statute, this Court has previously stated that all parts of a statute must be read together in order to achieve a consistent whole. T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996). Courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another. Id.

The Second District acknowledged this rule of statutory construction in its opinion, but applied the rule incorrectly. The Second District concluded that reading section 316.1932(1)(a)(1) in conjunction with sections 316.1932(1)(b)(2) and 316.1932(1)(f)(1) meant that an "approved" urine test is one in which the method of administration and the analysis of the test are "performed substantially according to the methods approved by" FDLE. State v. Bodden, 27 Fla. L. Weekly D2382 (Fla. 2d DCA Oct. 30,

2002). However, related sections in Chapter 316 support Petitioner’s argument that the Legislature did not require rule promulgation in accordance with the APA for urine testing.

In Florida Statutes section 316.1932(1)(f), the Legislature gave FDLE specific statutory authority to create rules for breath and blood testing. That subsection states the following:

> 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.

§ 316.1932(1)(f), Fla. Stat. (2000) (emphasis added). There is no comparable provision in section 316.1932 for urine tests. Section 316.1932(1)(f) clearly requires FDLE to promulgate rules when testing for alcohol in a person’s blood or breath. However, nowhere in the statute does that same requirement apply when FDLE tests a person’s urine for the presence of a chemical or controlled substance.

Several other related sections provide specific statutory authority to FDLE to promulgate regulations for breath and

blood testing. Section 316.1932(1)(a)(2) requires an analysis of a person's breath to have been performed substantially according to methods approved by FDLE. § 316.1932(1)(b)(2), Fla. Stat (2000). Section 316.1933 (2)(b) also requires an analysis to have been performed substantially according to methods approved by FDLE with respect to a person's blood. § 316.1932(2)(b), Fla. Stat. (2000). Section 316.1934(3) states that "a chemical analysis of the person's blood to determine alcoholic content or a chemical or physical test of a person's breath, in order to be considered valid under this section [for presumptions] must have been performed substantially in accordance with methods approved by the Department of Law Enforcement." § 316.1934(3), Fla. Stat. (2000). Again, these sections make no mention of urine tests to detect the presence of a chemical or controlled substance. Section 316.1932(1)(a)(1) requires only that a urine sample "be administered at a detention facility ... in a reasonable manner that will ensure the accuracy of the specimen and maintain the privacy of the individual involved." § 316.1932(1)(a)(1), Fla. Stat. (2000). Therefore, a reading of section 316.1932(1)(a)(1) in conjunction with other related sections clearly shows that the Legislature's consistent intent was to require FDLE to promulgate rules for breath and

blood testing, but not for urine testing.

The second rule of statutory construction this Court should use concerns the legislative intent behind the enactment of the statute. It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided in construing enactments of the legislature. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). A statute should be construed so as to give effect to the evident legislative intent. Griffis v. State, 356 So. 2d 297, 299 (Fla. 1978).

The language in the subsection at issue shows that the legislature intended to treat the testing of blood and breath differently than the testing of urine. Blood and breath testing are mentioned with respect to determine the presence of alcohol. § 316.1932(1)(a)(1), Fla. Stat. (2000). Urine testing is conducted in order to test the presence of chemical or controlled substances. Id. This difference in treatment supports Petitioner's position that the testing of urine does not necessarily require rule promulgation such as is the case with respect to blood and breath testing. See State v. Miles, 775 So. 2d 950 (Fla. 2000). Since section 316.1932(1)(a)(1) does not mandate FDLE to promulgate a rule with respect to urine testing, this Court should find that the collection,

preservation, and analysis of urine samples does not require a rule promulgated under the APA.

Further evidence that the legislature intended to treat urine testing different from blood and breath testing under the implied consent law is found in the legislative history of section 316.1934, the statute dealing with presumption of impairment and testing procedures. In 1970, the legislature deleted urine or saliva tests from the statute. ch. 70-279, §§ 3, 4, Laws of Fla. Thus, since the legislature did not require FDLE to promulgate rules in reference to urine testing for controlled substances when it enacted section 316.1932(1)(a)(1), the absence of a rule does not make the urine tests results inadmissible in this case.[2]

Finally, Petitioner contends that the Second District Court of Appeal erred when it applied the rule of lenity in its decision to find that the term “approved” applied to urine tests. In its opinion, the Second District relied on the statutory rule of construction which holds that when a penal

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[2]In the 2003 session, the Florida House of Representatives revised the language in section 316.1932. Most notably, the bill omits references to urine tests in section 316.1932(1)(a)(1) and separates blood and breath testing from urine testing. Act of Apr. 30, 2003, Fla. HB 947. While the new bill has not yet been signed by the Governor, it serves as an indication of the legislative intent regarding no rule promulgation for urine testing.

statute is ambiguous and capable of different constructions, it should be construed in favor of an accused. Bodden, 27 Fla. L. Weekly at D2382. The Second District cited section 775.021(1), Florida Statutes (2000), and Cabal v. State, 678 So. 2d 315 (Fla. 1996), as support for its position.

The application of this statutory rule of construction is inappropriate since Florida Statutes section 316.1932 is not a penal statute. Laws which are penal in nature should be strictly construed while laws that are remedial in nature should be construed liberally. Dotty v. State, 197 So. 2d 315 (Fla. 4th DCA 1967) (finding that sections 905.17 and 905.19, dealing with the prosecutor's presence at grand jury, were remedial in nature and not penal).

> A statute is penal in nature if it imposes punishment for an offense committed against the state and its term includes all statutes which command or prohibit acts and establishes penalties for their violations to be recovered for the purpose of enforcing obedience to the law and punishing its violation. However, a statute relating to procedure is remedial in nature in that it gives a remedy and tends to abridge some defect or superfluities of the common law.

Id. at 318.

The statute under consideration by this Court, section 316.1932(1)(a)(1), informs licensed drivers of Florida of their implied consent to submit to a blood, breath, or urine

test for the purpose of detecting alcohol, chemical substances, or controlled substances. Section 316.1932 neither imposes a criminal punishment nor does it establish a criminal penalty. The language detailing the criminal punishments and penalties for driving under the influence (DUI) can be found in sections 316.193 and 316.1934(1). Subsection (1) of section 316.1934 makes it unlawful and punishable for a person to drive or be in the actual physical control of a motor vehicle while under the influence of alcoholic beverages or controlled substances. § 316.1934(1), Fla. Stat. (2000). Section 316.193 delineates the penalties for driving under the influence. § 316.193, Fla. Stat. (2000). Therefore, section 775.021(1) has no bearing upon the construction of section 316.1932(1)(a)(1) for the simple reason that, by its terms, section 775.021(1) applies only to statutes which define criminal offenses, and section 316.1932(1)(a)(1) is not such a statute. See Jones v. State, 728 So. 2d 788 (Fla. 1st DCA 1999) (refusing to apply section 775.021(1) to section 90.803(23), the statute governing admissibility of out-of-court statements by alleged child victims).

In conclusion, the clear and ambiguous language of section 316.1932(1)(a)(1) shows that the Legislature did not intend for urine tests to be “approved” in order to be

admissible. The Second District's decision to apply the term "approved" to urine tests was an incorrect conclusion.

B. The Language in Florida Statutes Section 316.1932(1)(a)(1) Does Not Give FDLE Authority to Promulgate Rules With Respect to Urine Tests in Accordance with the APA.

By answering the certified question in the affirmative, the Second District made the implicit finding that the Legislature gave FDLE the authority to promulgate rules for urine testing under section 316.1932 (1)(a)(1). However, an agency has no jurisdiction to proceed beyond that granted it by statute; it has no inherent rulemaking authority. Orange County v. Debra, Inc., 451 So. 2d 868 (Fla. 1st DCA 1983). While section 316.1932(1)(f) and (1)(b)(2) clearly require FDLE to promulgate rules when testing for alcohol in a person's blood or breath, nowhere in the statute does that same requirement apply when FDLE tests a person's urine for a controlled or chemical substance.

Florida Statutes section 120.536 (2000) gives each State agency its rulemaking authority. Subsection (1) states the following:

> (1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No

> agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

§ 120.536(1), Fla. Stat. (2000).

This language prevents FDLE from promulgating rules with respect to urine tests since there is no specific language in section 316.1932(1)(a)(1) which necessitates such rulemaking. By requiring FDLE to adopt rules for urine testing in order for such tests to be "approved," the Second District required FDLE to do something which it has no statutory authority to do. Therefore, since the Legislature did not give FDLE specific authority to promulgate rules for urine test analysis, the absence of a rule does not make the urine tests results inadmissible in this case.

In deciding whether FDLE had the authority to promulgate rules with respect to urine tests, this Court should not only look at the language which the Legislature did not include in section 316.1932(1)(a), but also to the language actually contained in the statute. In section 316.1932(1)(b)(2), the statute states that in order for an analysis of a person's

breath to be considered valid, it must have been “performed substantially according to methods approved by the Department of Law Enforcement.” § 316.1932(1)(b)(2), Fla. Stat. (2000). The Legislature also specifically gave the authority to FDLE to promulgate rules with respect to the testing of blood for alcoholic content. § 316.1933(2)(b), Fla. Stat. (2000). There is no comparable language in section 316.1932 with respect to urine tests.

Respondent may argue that since the Legislature required rulemaking for breath and blood tests, this Court should also find that FDLE has rulemaking authority for urine tests. However, there are significant differences between blood, breath, and urine tests. The most obvious difference between the testing is the overall goal of each test. A chemical or physical test of a person’s blood or breath analyzes the alcoholic “content” in the person’s blood or breath, but a urine test merely detects the “presence” of a chemical or controlled substance. § 316.1932(1)(a)(1), Fla. Stat. (2000). Presumably, the analysis and testing to determine the alcoholic content of a person’s blood or breath is more complicated than a urine test and the Legislature required rulemaking to ensure the uniformity and accuracy of the test samples. See § 316.1932(1)(b)(2), Fla. Stat. (2000). The

Second District even recognized that blood and breath tests were different from urine tests when it stated, “We acknowledge, however, that the methodology for administering a urine test should be somewhat less complex than the methodology necessary for administering a breath or blood test.” Bodden, 27 Fla. L. Weekly D2382, p. 2.

Another difference concerns the State’s burden in establishing the introduction of the test results at trial. Section 316.193 provides that a person is guilty of DUI if the person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood or has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath. § 316.193(1)(b) and (c), Fla. Stat. (2000). The State benefits from presumptions of impairment if the alcoholic content is determined to be above a specified level. See State v. Miles, 775 So. 2d 950, 953-957 (Fla. 2000). However, there are no legal limits for the presence of a chemical or controlled substance. Section 316.193 merely provides that a person is guilty of DUI if the chemical or controlled substance impairs a person’s normal faculties. § 316.193(1)(a), Fla. Stat. (2000). The State does not receive the benefit of any presumption of impairment when a defendant provides a positive urine sample. The differences between the

testing may explain why the Legislature gave FDLE authority to promulgate rules with respect to blood and breath tests, but not with urine tests. As such, the Second District erred when it concluded that section 316.1932 gives FDLE the authority to promulgate rules for urine tests.

C. Even If a Urine Test Taken Pursuant to Section 316.1932 (1)(a) Must Be Approved, the State Should Be Able to Introduce the Urine Test and Results by Using the Traditional Predicate for the Admissibility of Evidence.

The Second District Court of Appeal incorrectly concluded that FDLE's failure to promulgate rules for urine tests makes the urine test inadmissible under the traditional rules regarding the admissibility of evidence. The Second District reasoned that since Respondent's consent was not voluntary, the State could not introduce the urine test or urine test results. The court's reasoning was flawed for two reasons. One, the suppression of the urine test and urine test results was an improper remedy to FDLE's failure to enact a rule. Two, there is no indication that Respondent's consent was involuntary.

Initially, Respondent contends that suppression of the test results was an inadequate remedy. If the Second District believed that FDLE should have promulgated rules for the collection, preservation, and analysis of urine, then

exclusion of the evidence was incorrect. Instead, the Second District should have allowed the State to attempt to introduce the evidence pursuant to the traditional rules of admissibility. If FDLE was required to “approve” urine tests, FDLE’s failure to do so should not result in the complete inadmissibility of the test results so long as the State establishes the "reliability of the test, the qualifications of the operator, and the meaning of the test results by expert testimony." Robertson v. State, 604 So. 2d 783, 790 (Fla. 1992) (quoting State v. Bender, 382 So. 2d 697, 700 (Fla. 1980)).

As support, Petitioner relies on the reasoning from this Court’s decision in State v. Miles, 775 So. 2d 950 (Fla. 2000). There, this Court faced the issue of whether a jury could be instructed regarding the presumptions of impairment where the FDLE regulations failed to provide guidelines for the collection, storage, and preservation of blood specimens. After a thorough discussion of the goals of the implied consent law, as well as the cases of State v. Bender, 382 So. 2d 697 (Fla. 1980) and Robertson v. State, 604 So. 2d 783 (Fla. 1992), this Court held that as a result of FDLE’s failure to provide guidelines for the collection, storage and preservation of blood specimens, the State would not be

permitted to take advantage of the presumptions of impairment contained within the standard jury instructions for DUI-based offenses. Id. at 957. However, most important for the instant case is the fact that Miles never held that the blood test results would be inadmissible. Rather, this Court specifically held that the blood test results would be admissible so long as the State met the common law predicate of Bender and Roberts.

In light of Miles, this Court must find that the Second District erred when it held that the urine test results would have to be suppressed for FDLE's failure to "approve" the urine testing process because such holding is completely contrary to Miles. While it is true that the instant case is factually distinguishable from Miles because the instant case is a DUI prosecution with a urine specimen showing the presence of a controlled substance, and the standard jury instructions do not even contain a presumption of impairment for urine cases, See § 316.1934, Fla. Stat. (2000), the holding of Miles still applies. Thus, the Second District should have allowed the State to admit the urine test results so long as the State met the traditional common law predicate for admissibility.

The Second District's decision was also incorrect because

it erroneously held that Respondent's implied consent was involuntary due to misinformation. As support for its position, the Second District relied on State v. Polak, 598 So. 2d 150 (Fla. 1st DCA 1992). In that case, the court held the use of an intoximeter that had been significantly modified from the approved version rendered consent involuntary. Id. at 153. The police obtained evidence of the defendant's blood alcohol content based on implied consent. Id. The Polak court held that the defendants' consent could not be voluntary because their consent was based on erroneous information that their licenses would be suspended for failure to submit to an unapproved test. Id. at 153-154.

The Second District's opinion also quoted State v. Burnett, 536 So. 2d 375 (Fla. 2d DCA 1988), in support of its argument that Respondent's consent was involuntary. In Burnett, police incorrectly told the defendant that his license would be suspended under the implied consent statute if he refused to consent to a blood draw (and not a breath test), when in fact, based on the factual circumstances and applicable statutes, the implied consent statute only required a breath test, not a blood test. Id. at 377. The court held that "misinformation" provided to the defendant by a police officer rendered consent involuntary and upheld suppression of

blood test results. Id.

The facts of this case are different. Here, police informed Respondent about implied consent and he agreed to the breath and urine test. However, Respondent does not claim that police provided him with erroneous information. Instead, Respondent simply claims that his consent was involuntary because police did not tell him that the test was unapproved. Moreover, in Polak, the statute in question specifically stated that the breath test had to be “approved.” That language is missing in section 316.1932 with respect to urine testing. Therefore, the Second District should not have relied upon Burnett or Polak.

In this case, Respondent did not challenge the testing procedures or claim that his test result was inaccurate. The absence of rules for urine testing returns the State to where it was before the rules for blood and breath testing were adopted. The State must establish the predicate required by Bender and Robertson; essentially, the "traditional" predicate for admission of the results of any other scientific test. Therefore, this Court should answer the certified question in the negative.

CONCLUSION

Petitioner respectfully requests that this Court answer the certified question in the negative and reverse the Second District Court of Appeal's decision to affirm the lower court's granting of the motion in limine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Eilam Isaak, Esquire, 4021 North Armenia Avenue, Suite 200, Tampa, Florida 33607-1010 this 19th day of May, 2003.

_____
COUNSEL FOR PETITIONER

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ANTHONY T. BODDEN, Respondent.	Case No. SC03-622 Second DCA Case No. 2D01-3535

APPENDIX

A Opinion of the Second District Court of Appeal, decided on October 30, 2002

B Order on Motion for Certification, dated March 28, 2003