CLE SEMINAR EVALUATION FORM

Name (Optional): _____ Date: February 22, 2013

Name of Course: Masters of DUI – 2013 1494R ES

City: Miami Facility: Hyatt Regency Downtown Miami

Please evaluate the speaker presentation for this Florida Bar CLE program based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you rate a presentation 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

Speaker	Speaker Rating	Course material	Comments
Eilam Isaak	___	___	_____
Lasonya Lacy-O'Connell	___	___	_____
Trisha Pasdach	___	___	_____
Susan Cohen	___	___	_____
David Robbins	___	___	_____
Bobby Reiff	___	___	_____
Michael A. Catalano	___	___	_____
Santo DiGangi	___	___	_____
Teresa Enriquez	___	___	_____
Brian Tannebaum	___	___	_____
Michael I. Zemon	___	___	_____
Carlos Pelayo Gonzalez	___	___	_____
Carlos Canet	___	___	_____
Michael A.. Catalano	___	___	_____

General Speaker Comments: _____

_____

_____

General Seminar Comments: _____

_____

Course material Comments: _____

_____

☐ Did you attend this course via **Webcast or Telephone**? If so, please send this completed form to FAX 850-561-9427.

Please evaluate the facility based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you use a rate of 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

___ Convenience
___ Aesthetics (comfort, cleanliness, etc.)
___ Amenities (restaurants, restrooms, parking, etc.)

Facility Comments: _____

_____

Where did you learn of this seminar?

☐ Bar *News* Ad ☐ Brochure ☐ FLABAR Website ☐ Section Website ☐ Other

Please identify any topic that you wish to see as the subject of future or expanded Florida Bar seminars:

_____

_____

Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 30 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org to Rules Updates to Rules Regulating The Florida Bar.

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date either by going to www.floridabar.org to Member Profile to CLE Status Inquiry or the mailing label of The Florida Bar News.

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Three months prior to the end of your reporting cycle, you will receive either:
   1) a CLER Reporting Affidavit, if you still lack hours; or,
   2) a CLER Notice of Compliance, if you have completed your hours.

7. **What do I do with the Affidavit?**
   You are to update and correct the form, complete any hours you lack, and sign and return the affidavit by your reporting date. Complete instructions appear on the reverse side of the form.

8. **What do I do with the Notice of Compliance?**
   If the information is correct, you need not respond. This document is your confirmation that you have completed the requirement for your current reporting cycle.

9. **What happens if I am late returning my Affidavit or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

10. **Will I receive any other information about my reporting cycle?**
    Approximately 45 days prior to the end of your reporting cycle, if you have not yet completed your hours.

11. Are there any exemptions from CLER?

Rule 6-10.3(c) lists all valid exemptions. They are:

1) Active military service
2) Undue hardship (upon approval by the BLSE)
3) Nonresident membership (see rule for details)
4) Full-time federal judiciary
5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
6) Inactive members of The Florida Bar

12. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

1) Lecturing at an approved CLE program
2) Serving as a workshop leader or panel member
3) Writing and publishing in a professional publication or journal
4) Teaching (graduate law or law school courses)
5) University attendance (graduate law or law school courses)

13. How do I submit various activities for credit evaluation?

Applications for credit may be found either on our website, www.floridabar.org, or in the directory issue of The Florida Bar Journal following the listing of Board Certified Lawyers.

14. How are attendance hours posted on my CLER record?

If you registered for a seminar through The Florida Bar Registrations Department, the credit will be posted to your record automatically. If the course is sponsored by a Florida Bar Section or another organization, you can post your credits online.

15. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

16. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

17. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

... CLER credit may not be counted for more than one reporting period
and may not be carried forward to subsequent reporting periods.

18. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

19. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don't forget to check your Basic Skills Course Requirement status.

The Florida Bar Continuing Legal Education Committee and
The Criminal Law Section present

Masters of DUI - 2013

COURSE CLASSIFICATION: ADVANCED LEVEL

February 22, 2013

Hyatt Regency Downtown Miami
400 SE Second Avenue
Miami, FL 33131

Course No. 1494R

THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 8.0 hours)

General ..... 8.0 hours Ethics ..... 1.5 hours

CERTIFICATION CREDIT

(Maximum 8.0 hours)

Criminal Appellate ..... 8.0 hours
Criminal Trial ..... 8.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar *News*) you will be sent a Reporting Affidavit (must be returned by your CLER reporting date) or a Notice of Compliance which confirms your completion of the requirement according to Bar records (does not need to be returned). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be ADVANCED.

CRIMINAL LAW SECTION

H. Scott Fingerhut, Miami — Chair
Susan Ogden Hugentugler, Fort Lauderdale — Chair-elect
H. Scott Fingerhut, Miami — CLE Chair

FACULTY & STEERING COMMITTEE

Michael A. Catalano, Miami — Program Chair
Carlos Canet, Ft. Lauderdale
Susan Cohen, Jacksonville
Santo DiGangi, Miami
Teresa Enriquez, Miami
Carlos Gonzalez, Miami
Eilam Isaak, Tampa
Lasonya Lacy-O'Connell, Key West
Trisha Pasdach, Miami
Bobby Reiff, Miami
David Robbins, Jacksonville
Brian Tannebaum, Miami
Michael I. Zemon, Miami

CLE COMMITTEE

Paul Chipok, Orlando — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Member Services visit our web site at www.floridabar.org.

LECTURE PROGRAM

8:00 a.m. – 8:45 a.m.	**Late Registration**
8:50 a.m. – 9:00 a.m.	**Welcome** *Michael A. Catalano, Esq., Program Chair, Miami*
9:00 a.m. – 10:10 a.m.	**Case Law Update** *Eilam Isaak, Esq., Tampa*
10:10 a.m. – 10:20 a.m.	**Break**
10:20 a.m. – 10:40 a.m.	**Navigating the FDLE Sites and Finding Intoxilizer Documents** *Lasonya Lacy-O'Connell, Esq., Key West*
10:40 a.m. – 11:10 a.m.	**Breath Suppression Issues** *Trisha Pasdach, Esq., Assistant Public Defender, Miami*
11:10 a.m. – 12:00 p.m.	**DHSMV Formal Reviews** *Susan Cohen, Esq. and David Robbins, Esq., Jacksonville*
12:00 p.m. – 1:15 p.m.	**Lunch on your own**
1:15 p.m. – 1:50 p.m.	**DUI Manslaughter and Serious Bodily Injury** *Bobby Reiff, Esq., Miami*
1:50 p.m. – 3:10 p.m.	**Ethics in DUI Cases** *Michael A. Catalano, Esq., Miami, Moderator* *Santo DiGangi, Esq., Assistant State Attorney, Miami* *Teresa Enriquez, Esq., Assistant Public Defender, Miami* *Brian Tannebaum, Esq., Miami* *Michael I. Zemon, Esq., Miami*
3:10 p.m. – 3:20 p.m.	**Break**
3:20 p.m. – 3:50 p.m.	**License Suspension Issues, Interlocks, Impoundment and How To Deal With All Of Them** *Carlos Pelayo Gonzalez, Esq., Miami*
3:50 p.m. – 4:30 p.m.	**Effective Motion Practice in DUI Cases** *Carlos Canet, Esq., Ft. Lauderdale*
4:30 p.m. – 5:00 p.m.	**Refusals, Issues and Creative Defenses in DUI Cases** *Michael A. Catalano, Esq., Miami*

TABLE OF CONTENTS

EFFECTIVE MOTION PRACTICE IN DUI CASES
Carlos Canet, Esq., Ft. Lauderdale

REFUSALS, ISSUES AND CREATIVE DEFENSES IN DUI CASES
Michael A. Catalano, Esq., Miami

AUTHORS/LECTURERS

CARLOS A. CANET has been a member of the Florida Bar since 1983. He began his legal career at the office of the Public Defender in Miami under the tutelage of Bennett H. Brummer. In 1989, he entered private practice and in 1990 joined the law firm of Essen & Essen. Carlos remained at the Essen firm until opening his own office in 2006. His practice for 28 years has been almost exclusively the defense of DUI cases. During that time, Carlos has been responsible for some locally significant rulings and opinions. In 1995, his motion excluding all field sobriety exercises in Broward County led to the opinion in State v. Meador. In 2005, his motion to exclude breath test results based upon the use of tap water to check Intoxilyzer calibration led to the decision in State v. Cubic. More recently, motions to suppress breath test results in Broward have led to several county court orders suppressing test results in hundreds of cases based upon questionable inspection techniques and practices. Currently, he maintains his office in Fort Lauderdale where he is working on a book for James Publishing due to be released in 2012, titled, "Pattern DUI Defenses."

MICHAEL A. CATALANO received his Juris Doctor Degree in May 1983 from Stetson University College of Law and his Bachelor of Science Degree in Business Administration in December 1978 from the University of Florida, Gainesville. He served as a State Prosecutor in Miami from 1983-1986. He is now a sole practitioner in Miami and specializes in the areas of Criminal Trial Practice, Appellate Practice and State and Federal Courts Limited Civil Practice. He is a member of the Supreme Court of the United States, United States Court of Appeals, 11th Circuit, United States District Court, Southern District of Florida (General and Trial Bar), Dade County Bar Association, National Association Criminal Defense Lawyers, Florida Association of Criminal Defense Lawyers, (State and Local Chapters, and frequent member of the Board of the local chapter), lifetime member FACDL-Miami, past officer and board member, The Florida Bar (Criminal Law and Appellate Sections) and the American Bar Association. He was also a member of the Board of Directors of DUI Countermeasures of Dade County, Inc., Community Services of Dade County, Inc., Miami-Dade Traffic Safety Program, Inc., DUI Driver Rehabilitation, Inc., and Drug-Alcohol Training Education, Inc. He was Chair of the Volunteer Attorney Panel for the Student Council for Traffic Safety Program. He was also a long standing member of the Florida Traffic and Criminal Rules Committees and frequently lectures on criminal law, traffic and DUI issues at CLE presentations throughout the nation and at many south Florida Public Defender training seminars. He is well known for being successful in many appeals of administrative review matters. He is well respected for handling numerous complicated felony cases in both the state and federal courts and for having been successful in numerous appeals. He is managing partner in Michael A. Catalano, P.A. in Miami, FL. Michael is also a commercial pilot, boat owner, avid sailboat racer and frequently lectures to the United States Coast Guard and FAA on pilot safety issues as well as search and rescue.

SUSAN COHEN was born and raised in Gainesville, Fl. Ms. Cohen completed her undergraduate degree at University of Florida in 1977. Ms. Cohen obtained her Juris Doctorate with Honors from the University of Florida College of Law in 1985. Prior to joining Epstein & Robbins in August of 2000, Ms. Cohen worked for the State Attorney's Office in Jacksonville, Fl from 1996 through 2000. From 1994 to1996 she worked as an Assistant Commonwealth's Attorney in Roanoke County, Va. While in Virginia she also worked for Lumsden, Overstreet & Hanson in Roanoke focusing on criminal law in both state and federal court. She began her legal career in the State Attorney's office in Gainesville, Fl. from 1985 to 1990. Currently Ms.Cohen's primary area of practice includes Appellate and Postconviction Relief including appeals of

administrative driver's license suspensions. Ms. Cohen has previously served on the Juvenile Rules Committee and a Florida Bar Grievance Committee where she served as Chair. Ms. Cohen has lectured at Blood, Breath, and Tears, as well as other seminars. She also serves on several community boards. Ms. Cohen resides in Jacksonville, Florida, with her husband. Ms. Cohen is the mother three adult children and she is the proud grandmother of Hannah, Jack, and Alex.

SANTO DIGANGI is a double graduate of the University of Florida. Santo graduated magna cum laude with a dual major in Political Science and Criminology and a minor in Business Administration. During law school, Santo was a Student Works Editor on the Entertainment Law Review, a teaching assistant for Legal Research/Writing and Appellate Advocacy, and a Certified Legal Intern in the Gator TeamChild Juvenile Law Clinic. Prior to joining the Miami-Dade State Attorney's Office, Santo served as a Trial Court Law Clerk for the 15th Judicial Circuit. Currently, Santo serves as an Assistant State Attorney in Miami-Dade County in the felony division. Previously, Santo served as the Assistant Chief of County Court for the DUI/Traffic Divisions. As Assistant Chief, Santo commanded the prosecution of thousands of DUI/Traffic cases in Miami-Dade County, litigated complex DUI motions on a variety of issues, and assisted in implementing the Back on Track DUI program.

TERESA ENRIQUEZ received her Juris Doctor Degree in May 1995 from University of Miami School of Law, where she was active on Moot Court Board. She received her Bachelor of Arts in English and graduated Phi Beta Kappa from Florida State University in May 1992. She has served as an Assistant Public Defender in Miami from 1995-present. She is currently the Chief Assistant for the County Court Division of the office, where she enjoys working with and training the most promising, talented young attorneys in the nation. In her more than 17 years as an Assistant Public Defender, Ms. Enriquez has tried countless criminal cases to verdict by jury. She has tirelessly defended clients charged with offenses across the spectrum of Florida's penal code, from relatively minor second degree misdemeanor offenses to capital felonies. In 2011, the Florida Association of Criminal Defense Lawyers, Miami Chapter, awarded The Rodney Thaxton "Against All Odds" Award to her for her work on the defense team of the highly-publicized and very unpopular "Baby Lollipops" case. The Greater Miami Chapter of the American Civil Liberties Union awarded her the C. Clyde Atkins Civil Liberties Award for her work on behalf of those facing the death penalty in Miami-Dade County. Ms. Enriquez recently served a 3 year term on a Florida Bar Grievance Committee. She is currently on the Board of Directors of Legal Services of Greater Miami, Inc. When not at work, she co-parents her four young children with the love of her life, Michael.

CARLOS PELAYO GONZALEZ, Esq. is a former Assistant State Attorney in the DUI misdemeanor division of the Miami-Dade State Attorney's Office. He served as the Drug Court prosecutor and in the Felony Division before joining Albert M. Quirantes in Private Practice. Now Mr. Gonzalez has started his own practice and serves as trial counsel for over half a dozen firms. As a criminal defense litigator he has tried hundreds of bench and jury trials as both a prosecutor and later as a private criminal attorney. Mr Gonzalez obtained his B.A. in Political Science from Florida International University in 1997 and his J.D. from the University of Florida in 2000.

EILAM ISAAK is the sole partner in the law firm of Isaak Law, PLLC, located in Tampa, Florida. He has been practicing law for the past 20 years. He began his career as a prosecutor with the Seminole County State Attorney's Office. While practicing as an Assistant State Attorney over a 5 year period, he received from MADD the AWARD OF EXCELLENCE for

being the top DUI Prosecutor for the Seminole County State Attorney's Office for 1993, 1994, and 1995. Mr. Isaak was invited by the Florida Prosecuting Attorney's Association to lecture at their DUI seminars on the topics of breath testing and closing arguments. During his tenure as an Assistant State Attorney, Mr. Isaak handled many high profile DUI prosecutions. As a defense attorney for the past 15 years, Mr. Isaak practices exclusively in the area of DUI defense. He consistently lectures for the Florida Association of Criminal Defense Lawyers, The Florida Bar, Lorman Education, and the Hillsborough County Bar Association at a variety of DUI defense seminars. He has lectured on numerous topics related to defending DUI cases (but has focused in recent years on the topic of pre-trial motions and case law updates). He is a certified breath test operator for the Intoxilyzer 8000 for Federal DOT standards and has been accepted and permitted to testify as an expert witness on the Intoxilyzer 5000. He is a graduate from Samford University Cumberland School of Law.

LASONYA LACY O'CONNELL received her Bachelor of Science from Southwest Baptist University in Bolivar, Missouri in December, 1998, and Juris Doctorate from the Florida International University College of Law in August, 2006. Mrs. Lacy O'Connell was admitted to practice in Florida in April, 2007, as well as the United States District Court, Southern District of Florida in 2008 and the United States District Court, Middle District of Florida in 2010. Mrs. Lacy O'Connell currently serves as the Secretary of the Monroe County Bar Association and previously served as the Secretary of the Monroe County Chapter of the Florida Association of Criminal Defense Lawyers. Mrs. Lacy O'Connell also served on the Criminal Courts Committee of the Dade County Bar Association from 2009 to 2011. Mrs. Lacy O'Connell was a guest speaker at the 2012 Masters of DUI seminar hosted by the Florida Bar in Tampa, as well as the 2012 Blood, Breath and Tears seminar hosted by the Florida Association of Criminal Defense Lawyers in Orlando.

TRISHA PASDACH was born and raised in Chicago, Illinois. After graduating summa cum laude from Bradley University with a Bachelor of Science in Psychology in 2003, Ms. Pasdach spent several years working as a case manager for adults with developmental disabilities in Kansas City, Kansas. Since obtaining her Juris Doctor with honors from the Georgetown University Law Center, Ms. Pasdach has been employed as an Assistant Public Defender in Miami, FL, where she spent her first year litigating, almost exclusively, DUI and other traffic related offenses. Ms. Pasdach remains at the Office of the Public Defender in Miami as an attorney in the felony division.

ROBERT "BOBBY" REIFF is the author of "DRUNK DRIVING AND RELATED VEHICULAR OFFENSES," now in its 5th Edition, which is published by the LEXIS Law Publishing Company. He is also a contributing author for "DEFENDING DUI VEHICULAR HOMICIDE CASES", 2012 Ed. (published by the West Law Publishing Company, a subsidiary of Thomson, Reuters); "DUI AND OTHER TRAFFIC OFFENSES IN FLORIDA", the Florida Bar; and "DRUNK DRIVING DEFENSE: AN EXPERT'S APPROACH" (published by the Professional Education Group, Inc.). He is also on the editorial board of the DWI LAW & SCIENCE JOURNAL. He is a frequent lecturer and author on topics involving the defense of alcohol-related offenses. Bobby has been named as one of the "Best Lawyers in America" for his handling of DUI cases and he holds an "AV" rating from MARTINDALE-HUBBELL. He was also chosen as an "exceptional" criminal defense attorney by the CONSUMER GUIDEBOOK OF LAW AND LEADING ATTORNEYS and he was recognized as one being of the "Best of the Bar" by the SOUTH FLORIDA BUSINESS JOURNAL and as one of "South Florida's Top Lawyers" by MIAMI METRO MAGAZINE. Bobby received the number one rating in a MIAMI HERALD blind study of the most effective DUI advocates in South Florida.

Bobby is a FLORIDA BAR BOARD CERTIFIED CRIMINAL TRIAL ATTORNEY whose offices are located in Miami and Fort Lauderdale, Florida. He is an avid competitive ice hockey player in his spare time.

DAVID ROBBINS attended the University of Florida for his undergraduate degree. He then graduated from the University of Florida Law School and was admitted to the Florida Bar in 1972. Upon graduation from law school, he worked as an Assistant State Attorney in Jacksonville, Florida, for approximately 3 years and entered the private practice of law in 1975, establishing the law firm of Epstein & Robbins. He has specialized in DUI defense and criminal law for the past 37years. Mr. Robbins is a member of the Florida Association of Criminal Defense Lawyers, Academy of Florida Trial Lawyers, National Association of Criminal Defense Lawyers, Jacksonville Bar and the Florida Bar. He has served as vice chairman of the Florida Traffic Rules Committee of the Florida Bar and has also been a member of the Rules of Judicial Administration Committee. Mr. Robbins has lectured for the Florida Bar at the Masters of DUI Seminars from 1994 to present, the Blood Breath and Tears seminar for the last several years and the Florida Association of Criminal Defense Lawyers, as well as other seminars. He and his wife Kim, reside in Jacksonville, Florida. He is very active in his faith and is very concerned with civic and community affairs.

BRIAN TANNEBAUM is the Past President of the Florida Association of Criminal Defense Lawyers and current President of the Florida Association of Bar Defense Lawyers. He also served as Chair of the Florida Bar Traffic Rules Committee and Member of the Criminal Procedure Rules Committee. He is a weekly columnist for Above the Law, and his professional ethics blog, mylawlicense.com was honored as one of the top 100 legal blogs by the ABA in 2011. He is a graduate of the University of South Florida and Stetson University College of Law, as well as a Certified Sommelier. He is AV rated by Martindale-Hubbell, listed in the Bar Register of Preeminent Lawyers, and admitted to practice in Florida, the United States District Courts for the Southern and Middle District of Florida, and the United States Supreme Court.
A newspaper reporter once wrote that Brian Tannebaum is “the lawyer that lawyers go to when they find themselves in hot water.” For the past 17 years Brian has practiced state and federal criminal defense, and after a term on a Florida Bar Grievance Committee a decade ago, began representing lawyers and law students in Florida Bar admission and grievance matters. Brian also handles legal malpractice defense, and other matters where lawyers need a lawyer – from partnership disputes, to advice on conflicts, and lawyers facing alcohol and drug problems.

MICHAEL I. ZEMON, received his Juris Doctor degree in 1994 from St. Thomas University School of law and his Bachelor of Arts degree from the University of Florida in 1990. He was a private defense attorney for law firms that specialized in traffic and criminal matters for many years. In 1997 he became partners with Patricia Marino in a firm called Marino and Zemon, PA, handling civil, criminal and traffic matters for clients in the south Florida area. In 2006, his former partner, Patricia Marino became a judge and he then became a sole practitioner in Michael I. Zemon, P.A. He is a member of the Florida Bar, FACDL, statewide and local chapters. He is happily married to his wife, Maryann and they have two boys, David 11 and Daniel 13. His office is located in Miami, Florida.

CASE LAW UPDATE

By

Eilam Isaak, Esq., Tampa

LAW OFFICES OF
EILAM ISAAK P.A.
306 EAST TYLER STREET
2nd FLOOR
TAMPA, FLORIDA 33602
(813) 443-5100
(813) 443-5102 (fax)

CRIMINAL LAW **DUI** **PERSONAL INJURY**

MASTERS OF DUI CLE SEMINAR 2013
CASE LAW UPDATE MATERIALS

Submitted by Eilam Isaak, Esq.

STATE OF FLORIDA V. SCHUMACHER – 99 So.3d 632 (1st DCA 2012) – The Defendant was convicted of DUI Manslaughter. The court imposed community control followed by probation. The State appealed and the DCA remanded with instructions to resentence the defendant to the minimum mandatory 4 years.

STATE OF FLORIDA V. HINMAN – 100 So.3d 220 (3rd DCA 2012) – After a lawful traffic stop, the officer (as a matter of course which he does in every case) asked the defendant if she had any weapons or drugs in the car without first giving any Miranda warnings . The defendant (stupidly) admits to having a "baggie of pills". The District Court holds that the defendant's admission is admissible citing to Berkemer v. McCarty. This case is contrary to Noto (42 So.3d 814 - 4th DCA 2010).

STATE OF FLORIDA, DHSMV, V. ROSE, 37 FLW D2574 (2nd DCA 2012) – This is an appellate review standard case, not a reasonable suspicion to investigate for DUI or probable cause to arrest for DUI case. The driver (defendant) is stopped for a traffic violation. During the 26 minutes of contact prior to the arrest, the officer never detects an odor of alcohol but investigates Rose for DUI anyways. The Circuit Court reverses the suspension finding that the failure to detect an odor of alcohol prior to arresting Rose fails to establish the required competent substantial evidence standard necessary to uphold a suspension under Florida Statute 322.2615 (which requires the existence of probable cause that the driver was under the influence). The DCA reverses finding that the Circuit Court reweighed the evidence. This case has been appealed to the Florida Supreme Court. ***In***

footnote #1, the DCA also holds that the HGN was properly excluded by the circuit court

STATE OF FLORIDA V. LOCKETT, 37 FLW D2790 (4th DCA 2012) – The defendant is pulled over for a noise ordinance violation. Three (3) years later, the ordinance is found to be unconstitutional. The trial court grants a motion to suppress. The DCA reverses holding that the police officer pulled over the defendant in "good faith" believing that the ordinance was valid. The officer could not have known that the ordinance would be struck down in the future.

PENNINGTON V. STATE OF FLORIDA, 100 So.3d 193 (5th DCA 2012) – The Defendant is convicted of DUI manslaughter. Both the State and defense presented expert witnesses in trial that reconstructed the accident. The defense expert's version was more credible and the State's expert even admitted as much. It was believed that the victim was driving a motorcycle and "popping a wheelie" when the accident occurred. As such, it would explain why the defendant did not see any headlights approaching (since it would have been facing upright) and how the marks got onto the hood and roof of the defendant's vehicle. The DCA reverses the DUI manslaughter conviction to simple DUI due to a lack of causation.

STATE OF FLORIDA V. McELDOWNEY - 99 So.3d 610 (5th DCA 2012) – The trial court struck down Florida Statute 316.1905(3)(b) as unconstitutional for creating a rule of procedure not adopted by the Florida Supreme Court. The DCA reverses holding that the statute only creates a rebuttable presumption that the speed measuring device was properly tested and operating. The DCA did also rule that the State still has to establish the hearsay exception to make the document admissible.

STATE OF FLORIDA, DHSMV, V.RAMNARINE – 37 FLW D2720 (2nd DCA 2012) – The DCA adopts the certified question from Robinson (93 So.3d 1090 – 2nd DCA 2012), in regards to the issue of whether the driver must seek enforcement of a subpoena for a witness who fails to appear after being properly served or whether the remedy for failing to appear is an invalidation.

SHORTER V. STATE OF FLORIDA, 98 So.3d 685 (4th DCA 2012) – The defendant wants to admit the forensic analysts report as a business of

confrontation relying upon Crawford v. Washington. The DCA holds that there is no confrontation clause issue for the State, only for the defendant. This is a reverse confrontation clause case.

STATE OF FLORIDA V. HANNAH – 98 So.3d 226 (1st DCA 2012) – This is a defacto arrest case. The defendant is moved from the scene of the traffic stop. He is taken ½ a block away. The court rules that this minimal distance does not exceed the immediate vicinity. The court states that moving a defendant to another location not in proximity to the traffic stop can subject the police to exceeding the scope of the detention.

REED V. STATE OF FLORIDA, 96 So.3d 1118 (1st DCA 2012) – The court found no Miranda violation in this case but court cautions against reading Miranda warnings in rapid fire process.

FEAST V. STATE OF FLORIDA, 37 FLW D1881 (4th DCA 2012) – This is a Hobson's choice type case. The defendant does not have to choose between the right to discovery and the right to speedy trial.

PRESCOTT V. STATE OF FLORIDA, DHSMV, 19 FLWS 770 (14th Cir 2012) – The Department of Highway Safety argues on appeal a position that is not a reasonable interpretation of the facts, the court grants the petition and accesses attorneys fees against the DHSMV for taking an unreasonable position.

SOLERNOU V. STATE OF FLORIDA, DHSMV, 19 FLWS 771 (11th Cir 2012) – The hearing officer improperly restricted the driver's cross examination of a police officer on the issue of credibility related to an internal affairs investigation. The restriction is a due process violation. See also **Thompson, 19 FLWS 917 (4th Cir 2012)** – Where the hearing officer limited cross examination on effects of a concussion.

STATE V. HOLLMAN, 19 FLWS 774 (17th Cir 2012) – Plug pull case. See also Santana, 19 FLWS 786 (17th Cir 2012).

JORDAN V. STATE OF FLORIDA, DHSMV, 19 FLWS 778 (11th Cir 2012) – Driver (defendant) is arrested and has a bleeding lip. The police officer subjectively believes that a breath test is impossible and calls for EMS to come a take blood. The driver (defendant) refuses. The refusal

suspension is setaside because the driver (defendant) did not appear at a medical facility for treatment.

GEORGIEV V. STATE OF FLORIDA, DHSMV, 19 FLWS 783 (11th Cir 2012) – The driver (defendant) was arrested in Monroe county, the DHSMV unilaterally (without the driver's agreement) schedules the formal review for hearing in Dade County. The court reverses the suspension because the administrative hearing must be held in the county where the arrest occurred unless the driver agrees to the change of venue. See also – Rose, 19 FLWS 803 (11th Cir 2012), Coyle, 19 FLWS 811 (11th Cir 2012), Bruland, 19 FLWS 911 (11th Cir 2012), Dostaler, 19 FLWS 922 (11th Cir 2012), Alteslaben, 19 FLWS 977 (11th Cir 2012), Mason, 19 FLWS 998 (11th Cir 2012), Linsman, 19 FLWS 999 (11th Cir 2012), Paulik, 19 FLWS 1055 (11th Cir 2012), Stewart, 19 FLWS 1061 (11th Cir 2012).

EDGELL V. STATE OF FLORIDA, DHSMV, 19 FLWS 792 (11th Cir 2012) – The driver (defendant) is pulled over for allegedly speeding but the police report fails to provide specifics about the details. Based upon Roberts (938 So.2d 513 (5th DCA 2006), the circuit court reverses the suspension because the report as written is conlcusory and fails to provide sufficient facts about the officer's point of view.

GEISSLER V. STATE OF FLORIDA, DHSMV, 19 FLWS 798 (12th Cir 2012) – EMS is first on the scene and the driver (defendant) gives them the keys to the vehicle and they are placed on the roof of the car. The police arrive and the driver (defendant) is out of the car. The court determines that the police cannot rely upon the EMS observations of the driver (defendant) in the car as a basis to place him behind the wheel or the keys in the ignition for actual physical control. The opinion discusses numerous other cases which involve the fellow officer rule.

PETERFI V. STATE OF FLORIDA, DHSMV, 19 FLWS 805 (6th Cir 2012) – The driver (defendant) delayed leaving a traffic signal for 23 seconds. The police officer testified that this delay obstructed traffic so that drivers honked their horns , so the court found the stop justified.

STATE OF FLORIDA V. OAKES, 19 FLWS 813 (12th Cir 2012) – The defendant swerved his vehicle one (1) times and then jerked the car back. The court found the traffic stop unlawful.

STATE OF FLORIDA V. RIDDLE, 19 FLWS 849 (18th Cir 2012) – The defendant crossed the lane marker three 93) times in 2/10 of a mile but did not endanger any other drivers. The police never testified about any specifics of how far the defendant's car crossed the lane marker. The court found the traffic stop to be illegal.

STATE OF FLORIDA V. PAGAN, 19 FLWS 853 (9th Cir 2012) – The defendant makes an admission to being the driver. The court excludes the defendant's admission under corpus delecti because there is no independent evidence placing him behind the wheel of the car. Their was four (4) people at the scene of the accident but apparently the officer only spoke to the defendant.

STATE V. PLOTT, 19 FLWS 855 (6th Cir 2012) – The police officer failed to follow the standardized procedures established by NTSHA. The court excluded the HGN exercise based upon the NTSHA manual which states that the failure to follow the standardized procedures compromises the validity of the exercises. The court also excludes –pre-miranda statements.

STATE V. IRONS, 19 FLWS 864 (18TH Cir 2012) – The defendant was involved in an accident. The officer changed hats but failed to follow it immediately with Miranda warnings. Based upon the Florida Supreme Court case of Marshall, the court excludes the defendant's pre-miranda statements. See also **Bailey, 19 FLWS 881 (2nd Cir 2012)**

STATE V. BRYANT, 19 FLWS 870 (18th Cir 2012) – The court rules contrary to **Young** [18 FLW S 1084 (6TH CIR 2011)] & **Riveira**, 19 FLWS 1048 (15th Cir 2012)] that the breath test operators permit is valid. See also **Espy** – 19 FLWS 993 (6th Cir 2012)

STATE V. GROSS. 19 FLWS 894 (18th Cir 2012) – The defendant touched the fogline five (5) times in five (5) miles. The court determines that the traffic stop is unlawful.

HERNANDEZ V. STATE OF FLORIDA, DHSMV, 19 FLWS 908 (11TH CIR 2012) – The hearing officer and a witness are located in a different location. The witness cannot be properly cross-examined about

the videotape since he cannot see it nor can the hearing officer review the video since he is in a different location. The court reverses the suspension.

HANCOCK V. STATE OF FLORIDA, DHSMV, 19 FLWS 918 (4th Cir 2012) – The police failed to follow the road block written plan by stopping every 5th car instead of every 3rd. The police also stopped the road block early. These violation made the road block unconstitutional. See also **Arrieta-Rameriez, 19 FLWS 966 (17th Cir 2012)** – road block is unconstitutional because the police failed to follow written plan. The supervisor was permitted to decide who was stopped and the road block failed to adhere to the start and stop times.

BOURNOS V. STATE OF FLORIDA, 19 FLWS 939 (5th Cir 2012) – The court grants the motion to inspect the Intoxilyzer 8000. The court denies the request for the source code among other issues.

STATE V. LYMEN, 19 FLWS 953 (15th Cir 2012) – The police officer took the defendant to the hospital for a blood test. The court suppresses the blood result since the officer took the defendant to the hospital instead of the defendant going there for medical treatment.

STATE OF FLORIDA V. PEARSON, 19 FLWS 962 (17th Cir 2012) – The defendant drives into the bike path but does not affect any bikers. The court suppresses the traffic stop.

DECAMP V. STATE OF FLORIDA, 19 FLWS 970 (11th Cir 2012) – Defendant pleads guilty to DUI on a bike. [REALLY????? A plea. Should have been a trial]

BAXIVANAKIS V. STATE OF FLORIDA, DHSMV, 19 FLWS 978 (6th Cir 2012) – The driver (defendant) crosses over the lane marker but does not affect any traffic. The court determines that a driver does not have to affect traffic to violate the statute by citing to Yanes and Ndow. This is incorrect by the court, the 6th Circuit is a Crooks jurisdiction.

STATE V. WALSH, 19 FLWS 986 (17th Cir 2012) – The court writes "in addition, some weight should be given to reasonable notions of societal expectations, as these deputies noted in a manner that society would have expected and deemed to be reasonable".

KELLY V. STATE OF FLORIDA, DHSMV, 19 FLWS 988 (13th Cir 2012) – Hearing officer's order contains no explanation or analysis. Similar to **Sarro - 19 FLW SUPP. 538 (13th Cir 2012).** See also **Linscheid** – 19 FLWS 990 (13th Cir 2012) , **Wilson** - 19 FLWS 995 (13th Cir 2012)

BENNETT V. STATE OF FLORIDA, DHSMV, 19 FLWS 996 (16th Cir 2012) – The driver's counsel issued his own subpoena to a witness to appear to the formal review hearing. Per administrative rule, only the DHSMV can issue subpoena's.

COUNTS V. STATE OF FLORIDA, DHSMV, 19 FLWS 1002 (15th Cir 2012) – The driver (defendant) has asthma. The condition prevented him from providing a breath sample. His refusal is determined by the court not to be willful. Suspension is reversed.

STATE V. CARACCI, 19 FLWS 1025 (2nd Cir 2012) – The breath machine exhibits 10 control tests out of tolerance in one month. This is the most of any machine in the State for the month. The court relying upon **Kurtz**, **19 FLW SUPP. 491 (13th Cir 2012),** suppresses the breath test results.

STATE V. WILSON, 19 FLWS 1028 (15th Cir 2012) – The defendant is involved in an accident at 2:37 am and taken to the hospital. The police arrive there at 3:22 am and the defendant is being released. The police order a blood test. The court suppresses the results finding that a breath test was not impossible or impracticable since the defendant had already been discharged.

BUNELL V. STATE OF FLORIDA, DHSMV, 19 FLWS 1060 (9th Cir 2012) – The hearing officer continues the formal review two (2) times. No just cause exists for the 2nd continuance and the court determines that the hearing officer is not permitted to continue the formal review more than once (absent just cause). The appellate court reverses the suspension.

STATE V. BIRCHFIED, 19 FLWS 1093 (20TH Cir 2012) – The defendant is sleeping in a lawfully parked vehicle. The police enter the vehicle by waking him up claiming the caretaker doctrine permits the

intrusion. The court rejects this argument finding that by accepting it, the police would have unfettered ability to seize sleeping persons.

CASE LAW MATERIALS FROM CLE SEMINAR IN SEPTEMBER 2012

BAZEMORE V. STATE, 79 So.3d 828 (2nd DCA 2011) – Trial court permits the State to elicit testimony that defendant makes statement that he contacted an attorney and was advised to "lay low" to show consciousness of guilt. The defendant's statement was made prior to the defendant being arrested. The DCA reversed saying that the State is not permitted to argue the defendant's request for an attorney prior to an arrest is consciousness of guilt citing to Dendy v. State, 896 So.2d 800 (4th DCA 2005).

NADER V. STATE OF FLORIDA, DHSMV, 87 So.3d 712 (FLA. 2012) –The LEO requests breath, blood, or urine when only breath is statutorily permitted based upon the facts presented. The Supreme Court says the LEO is permitted to request multiple chemical tests, even if it they are not statutorily authorized, so long as one of the requested tests is. The supreme court seems to state in dicta that the driver may be free to choose the test of his/her choice.

STATE V. VENEGAS, 79 So.3d 912 (2nd DCA 2012) - Fruit of the poisonous tree doctrine applies to physical evidence procured in violation of 5th Amendment rights.

BRIBIESCA-TAFOLLA V. STATE, ___ So.3d ____, 37 FLW D1405 (4th DCA 2012) – Circumstantial evidence which may not be enough to prove defendant was the driver beyond a reasonable doubt is nevertheless enough to meet requirement for corpus delecti standard to permit defendant's admission to the police (post Miranda) that he was the driver. [Defendant lived in Ft Pierce. The vehicle is registered to defendant's wife. Defendant left home at 2:30 am to pick up friend. At 7:10 am in Jupiter the defendant and his friend were involved in an accident where both were ejected and the police are not certain who was driving].

<u>YACOUB V. STATE</u>, 85 So.3d 1179 (4th DCA 2012) – case reaffirms the standards for a counsel waiver so that a DUI conviction may be used for enhancement in the future. The defendant must assert under oath the (1) a prior DUI conviction was punishable by more than 6 months, (2) the defendant was indigent and entitled to court appointed counsel, (3) counsel was not appointed, and (4) the right to counsel was not waived. This shifts the burden to the State to prove either that counsel was provided or that right to counsel was waived.

<u>KS V. STATE</u>, 85 So.3d 566 (4th DCA 2012) – Defendant is sitting in a parked car with the motor running, headlights on, and a tag light out. LEO initiates a traffic stop for the tag light violation. The defendant argues that the stop is illegal because it is a potential future traffic violation. The court rejects the defendant's argument holding that the tag light is a non moving violation. Therefore, the stop is valid.

<u>GARCIA V. STATE</u>, 88 So.3d 394 (4th DCA 2012) – Defacto arrest case. When the police use safety precautions it becomes extremely important that the LEO explain to the defendant that he/she is not under arrest and is free to leave.

<u>BOSWELL V. STATE</u>, ___ So.3d ____, 37 FLW D1638 (4th DCA 2012) – Trial case. To preserve a jury selection issue, (1) counsel must reassert an objection when accepting the panel, (2) counsel must request cause challenge that is denied and then request additional peremptory challenge that is also denied.

<u>STATE OF FLORIDA, DHSMV V. CARRILLON</u>, ___ So.3d ____, 37 FLW D1801 (1st DCA 2012) – The circuit court applied the correct law, therefore, the DCA cannot intervene (even if it disagrees with the application of the facts to the law). This case reaffirms the principle that there is a difference between applying the wrong law versus applying the correct law, incorrectly.

<u>STATE V. SALLE-GREEN</u>, ___ So.3d ____, 37 FLW D1853 (2nd DCA 2012) – LEO requested blood test without PC. LEO couldn't recall why he asked for blood test or that a blood test was even requested. The LEO could identify to his signature on the evidence but had no independent recollection after seeing it. The nurse had no independent recollection

either but could identify her signature on the evidence also. The court suppresses the legal blood and medical blood. The DCA permits the state to resubpoena the medical blood because there was no bad faith on the part of law enforcement precluding it.

STATE OF FLORIDA, DHSMV, V. ROBINSON, ___ So.3d ____, 37 FLW D1542 (2nd DCA 2012) – LEO witness fails to appear for formal review after being lawfully subpoenaed. The circuit court invalidates the suspension finding that seeking enforcement is not the appropriate remedy relying upon Pfleger because it adds an additional procedural step not contemplated by the administrative rules entitling the driver to a meaningful hearing to confront and cross examine witnesses within 30 days. The DCA agrees that Lankford is dicta and is non-binding on the circuit court, the DCA also finds that there is a conflict between circuits but that they are not specifically approving Robinson and quashing the 13th circuit. The DCA simply says that Robinson is an acceptable interpretation of the applicable statute.

ARENAS V. STATE OF FLORIDA, DHSMV, 90 So.3d 828 (2nd DCA 2012) – Arenas is pulled over at a road block. He refuses the breath test and his driving privileges suspended. The criminal charge is nolle prossed. DCA remands the case back to the circuit court to decide the mechanism the driver has to enforce his right to challenge the lawfulness of the arrest. The DCA gives the circuit court the option of remanding to the hearing officer to decide or to Arenas to file a dec action in the circuit court to determine his rights.

LAWRENCE V. STATE OF FLORIDA, DHSMV, 37 FLW D1202 (2nd DCA 2012) – The DCA finds a distinction between Lawrence and Arenas because Lawrence pled to reckless driving (whereas Arenas' criminal charge was nolle prossed). The DCA remands this case to the circuit court to determine whether having the opportunity to file a motion in the criminal case satisfies the requirement to challenge the lawfulness of the stop from Hernandez, in addition to the same decisions ordered in Arenas. See also Rudolph v. State of Florida, DHSMV, 37 FLW D 1202 (2nd DCA 2012).

ROARK V. STATE OF FLORIDA, DHSMV, ___ So.3d ____, 37 FLW 1204 (2nd DCA 2012) – The DCA finds another distinction between Roark, Lawrence, and Arenas. Roark had an unlawful BAC (as opposed to a

refusal) and also pled to reckless driving (as did Lawrence). The DCA remands this case to the circuit court to determine whether having the opportunity to file a motion in the criminal case satisfies the requirement to challenge the lawfulness of the stop from Hernandez, in addition to the same decisions ordered in Arenas and Lawrence. And also to decide whether the exclusionary rule applies to administrative proceedings. See also Ferrei v. State of Florida, DHSMV, 37 FLW D 1606 (2nd DCA 2012), Pankau v. State of Florida, DHSMV, 37 FLW D 1607 (2nd DCA 2012).

CRIST V. STATE, ___ So.3d ____, 37 FLW D1625 (2nd DCA 2012) – LEO stops defendant for riding a bike without a light. LEO testified that the defendant was free to leave after he wrote the citation but conceded that he never informed him of it. Trial court denied the motion finding that because the LEO testified that the defendant was free to leave, he must have been. DCA reverses saying that if the LEO delays the defendant's departure after writing the citation, the LEO must tell the defendant that he has a right to leave. If the LEO fails to tell the defendant that the stop is over and he is free to leave, the state carries a heavy burden to prove the defendant knew he could leave.

HARMAN-HORTON V. STATE, ___ So.3d ____, 37 FLW D1629 (1st DCA 2012) – LEO testified during trial (without objection from the defense) about administering the HGN exercise but did not provide any further details. In closing argument, the prosecutor argues numerous facts about the HGN which are not in evidence. The defense objects and the court gives an instruction. Because the defense failed to object to the testimony, the standard of review on appeal is abuse of discretion instead of harmless error. Based upon the standard of review, the conviction is affirmed. Had the standard been harmless error, the appellate court would have reversed.

STATE V. TAYLOR, 79 So.3d 386 (4th DCA 2012) – good faith exception applies to pre-Gant searches.

DUKE V. STATE, 82 So.3d 1155 (2nd DCA 2012) – Defendant drove on white lines 2x's without affecting traffic. During the hearing , the LEO testified that he believed that the defendant may have been ill, tired, or impaired. The LEO conceded that his report did not have any mention of that opinion nor did the videotape (which contained the audio portion of

LEO calling in the stop) contain any statements that he had that belief. The county court decided that the stop was based upon failure to maintain a single lane because there was a complete absence of evidence that the LEO believed that the defendant maybe ill, tired, or impaired (other than his hearing testimony). On appeal, the circuit court reversed the stop based upon the evidence that the LEO believed that the defendant was ill, tired, or impaired. The DCA reverses finding that the circuit court applied the wrong law. The law should have been probable cause that a traffic infraction actually occurred and not reasonable suspicion that the defendant maybe ill, tired, or impaired.

STATE V. GAULDEN, 37 FLW D867 (1st DCA 2012) – The court defines crash/collided. The defendant's passenger was ejected from the vehicle and collided with the road. The trial court dismissed the case believing that because there was no crash between the passenger and with the defendant's vehicle, that no crash had occurred.

BARTON V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 163 (4th Cir 2012) – BTO permit expired. Court adopts the rationale from Young v. State of Florida, DHSMV, 18 FLW SUPP. 1084 (6TH CIR 2011). Renewal is required every 4 years.

TSARDOULIAS V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 175 (6th Cir 2012) – LEO requested 2 continuances. The first without any reason provided (and the hearing officer granted the request) and the 2nd with only a statement that he had a scheduling conflict. The hearing officer gain granted the request. The court found that the 2nd request was not just cause and as such the hearing officer departed from the essential requirements of law.

KELSY V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 176 (6th Cir 2012) – The driver had a prior refusal on his record which was incorrect. He provided evidence that it was incorrect arguing that he could only be suspended for 1 year (with a hardship permit after the hard time expired) but the hearing officer determined that he had no control over the period of suspension, that his only role was to decide whether to uphold the suspension or not. The court disagreed with him finding that it is within the scope of review to decide the period of suspension and because there was no evidence of his prior in the record, the suspension was quashed.

MORALES V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 310 (11th Cir 2012) – The record evidence failed to include Morales' driving history showing a prior refusal entitling the DHSMV to the enhancement of time for a second refusal. The court reduces the period of suspension to 12 months instead of 18.

EISENMENGER V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 183 (18th Cir 2012) – Speed measuring device certification is not admissible as a public records exception to the hearsay rule without the custodian of records testimony or proper certification and seal. Statute 316.1905 is an unconstitutional infringement on the authority of the Florida Supreme Court to set procedural rules.

JARAMILLO V. STATE, 19 FLW SUPP. 613 (11th Cir 2012) – In a motion to suppress, the standard for evidence evaluation to be applied by the court is totality of the circumstances without favoritism to either party, not as the State argued that it is "the light most favorable to the State". Citing to Wheeler v. State, 37 FLW D 194 (5th DCA 2012).

STATE V. BASS, 19 FLW SUPP. 653 (2nd Cir 2012) – A civilian calls in an impaired driver. The defendant is already outside of her car when the LEO arrives. A key is in her hand. LEO never verifies that the key in the defendant's hand will start the vehicle. The court rules that the LEO did not have PC to believe that the defendant was in APC. The court also correctly refuses to apply the fellow officer rule to the civilian.

STATE V. BICE, 19 FLW SUPP. 661 (15th Cir 2012) – The defendant is involved in an accident and taken to the hospital. LEO requests blood based upon a breath test being impossible or impracticable. Within 3 hours of the accident, the defendant is released from the hospital and booked into the jail. The court suppresses the blood test finding that a breath or urine test was obviously not impossible or impracticable.

JANISZEWSKI V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 226 (8th Cir 2012) – Honking the horn to make pedestrians walk faster is illegal use of the horn justifying a traffic stop.

ESCANDELL V. STATE, 19 FLW SUPP. 228 (11th Cir 2012) – The trial court excluded a defense witness from testifying that the LEO stated that the defendant passed the FSE's which would have contradicted the trial testimony. The appellate court said that was not harmless error and the conviction was reversed.

STATE V. PURDY, 19 FLW SUPP. 235 (11th Cir 2012) – Error for trial court to not grant the State's motion to continue after the State made effort to secure the witnesses attendance.

NOVA V. STATE, 19 FLW SUPP. 242 (11th Cir 2012) – Prospective juror flip flops with her answers depending on whose asking the question. The trial court denies the defendant's cause challenge and request for additional peremptory. The juror gets on the jury. The appellate court reverses finding that the juror should have been struck for cause.

STATE V. HARKEY, 19 FLW SUPP. 287 (17th Cir 2012) – This case is the most comprehensive analysis of what constitutes probable cause to arrest. The court finds the existence of reasonable suspicion to investigate for DUI and then finds that the defendant's performance dispelled any legitimate suspicion that the defendant was DUI making her arrest for DUI illegal.

STATE V. MORRISON, 19 FLW SUPP. 664 (15th Cir 2012) – LEO notices odor of alcohol and no other signs of actual impairment. The court decides that there is no reasonable suspicion to investigate for DUI (this case is consistent with Taylor, not Amerqrane).

STATE V. KEYS, 19 FLW SUPP. 517 (17th Cir 2012) – LEO stops the defendant for having unlawful tint (a driving pattern not indicative of impairment). LEO detects odor of alcohol. Court finds no reasonable suspicion to investigate for DUI.

STATE V. BRANTLEY, 19 FLW SUPP. 373 (7th Cir 2012) – The Defendant is pulled over for speeding. The LEO detects an odor of alcohol coming from the interior of the vehicle and then from the defendant. The LEO also observes slight blood shot eyes. The court determines that no reasonable suspicion exists to investigate for DUI. The case cites to the Florida Supreme Court case of Taylor, 752 So.2d 701 (Fla. 1995).

CK V. STATE, 19 FLW SUPP. 642 (19th Cir 2012) – LEO uses overhead light, emergency lights, and show of authority. The court decides this is a seizure under the 4th Amendment. The case has a great explanation of and citations to cases with shows of authority which elevates consensual encounters into seizures under the 4th Amendment.

STATE V. LUIS-LOPEZ, 19 FLW SUPP. 563 (18th Cir 2012) – LEO blocked in the defendant's vehicle, 1 LEO approaches from the driver side while a 2nd LEO approaches from the passenger's side. The court determines that this is a sufficient show of authority to constitute a seizure under the 4th Amendment

CIESLAK V. STATE, 19 FLW SUPP. 681 (6th Cir 2012) – The defendant is asleep in a parked car. The LEO parks behind him and also uses his spotlight (but not emergency equipment). The LEO then approaches the vehicle and knocks on the window waking up the defendant. The LEO then motions the defendant to lower the widow. The court rules that this show of authority is a seizure under the 4th Amendment.

GRACE V. STATE, 19 FLW SUPP. 702 (11th Cir 2012) – The defendant is sitting in a parked car in front of a residence. The defendant is sitting in the driver's seat with it in a reclined position. The keys are in the ignition. The LEO parks behind the defendant and uses his light. The trial court denied the motion to suppress but the appellate court reverses finding a seizure based upon a sufficient show of authority.

SARRO V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 538 (13th Cir 2012) – Hearing officer fails to give an explanation or analysis for denying Sarro's motion to challenge the lawfulness of the stop of his vehicle. Circuit Court cannot discern from lack of explanation or analysis whether the hearing officer determined whether the request to submit to a breath test was incidental to a lawful arrest.

PACE V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 706 (15th Cir 2012) – The hearing officer's order fails to express findings that the breath test was incidental to a lawful arrest. See also Smith v. State of Florida, DHSMV, 19 FLW SUPP. 706 (6th Cir 2012).

MAHONEY V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 334 (15th Cir 2012) – The court finds the hearing officer's decision upholding the suspension of Mahoney's driving privileges implicitly includes the lawfulness of the arrest. This case is essentially contrary to Sarro. The dissent lists many cases where the court has found remanding to the hearing officer is the appropriate remedy.

STATE V. KURTZ, 19 FLW SUPP. 491 (13th Cir 2012) – Defendant blows into a breath machine which had 8 control tests out of tolerance during the 1 month of his breath test procedure. The Defendant demonstrated that this was a sufficient anomaly to exclude the breath test by admitting 14 months of statistics showing that Hillsborough County has a total of 8 machines and in a combined total of all of the machines, there was either only 1 control test out of tolerance per month or no control tests out of tolerance per month. It took going back 14 months, to total 8 control tests out of tolerance on the 8 machines.

STATE V. GUNTERT, 19 FLW SUPP. 517 (17th Cir 2012) – Agency inspector rubbed alcohol on her lips and gums to complete the mouth alcohol procedure during the agency inspection. This was a violation because the procedure requires rinsing her mouth with the alcohol, not just rubbing it on her lips and gums. The court suppresses the breath test. See also – State v. Kemmer, 19 FLW SUPP. 519 (17th Cir 2012), State v. Bethart, 19 FLW SUPP. 421 (17th Cir 2012)

TORRENCE V. STAT OF FLORIDA, DHSMV, 19 FLW SUPP. 698 (6th Cir 2012) – The breath machine was taken off line for repairs. While still in Lakeland at the repair facility, FDLE conducted it's a department inspection per 11D-8.004. A department inspection was not performed after the machine was "returned" to St. Petersburg police. Torrence challenged compliance with 11D-8.004 arguing that the rule requires the department inspection is supposed to be performed on the machine after it's "return" from the repair facility. The appellate court determined that the hearing officer's interpretation was a reasonable interpretation and not clearly erroneous.

STATE V. OSORIO, 19 FLW SUPP. 734 (7th Cir 2012) – The agency inspector experiences three (3) issues during the agency inspection resulting in a 4th test before the machine finally passes. He fails to properly

document what happened, make comments in the remarks section of the agency inspection form, or contact the department inspector. The court excludes the breath test for violation of properly documenting the issues or contacting the department inspector.

MENEDEZ V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 338 (11th Cir 2012) – A motorcycle is not a motor vehicle under Florida Motor Vehicle Act, chapter 324.

STATE V. ROMINE, 19 FLW SUPP. 517 (17th Cir 2012) – The defendant crosses the white line. The LEO says the defendant failed to obey a traffic control device. The court analyses this by considering whether the white lines are in fact traffic control devices. The court relies upon the Federal Highway Administration Manual on Uniform Traffic Control Devices. The court determines (based on the manual) that the white lines are for visual guidelines and crossing them is not a violation. Other guidelines specifically state that crossing lines is not permitted but no such prohibition exists for the white lines.

STATE V. JAHADA, 19 FLW SUPP. 369 (4th Cir 2012) – Confusion doctrine case based upon Kurecka, 67 So.3d 1052 (4th DCA 2010). Breath test operator read implied consent warning and followed it by Miranda. The defendant invoked his right to remain silent and the breath test operator did not clear up the confusion.

STATE V. MELENDEZ, 19 FLW SUPP. 376 (17th Cir 2012) – LEO has no independent recollection. He did not write the probable cause report. His own notes are now missing. The court grants the motion to suppress. This case is consistent with KEA v. State, 802 So.2d 410 (3rd DCA 2001), State v. Bendetti, 7 FLW SUPP. 130 (11th Cir 1999).

STATE V. HARRISON, 19 FLW SUPP. 377 (4th Cir 2012) – The State cannot use the traditional predicate if the defendant is given an implied consent warning.

STATE V. BRYAN, 19 FLW SUPP. 408 (16th Cir 2012) – LEO tells the defendant that performing FSE's is voluntary. The defendant refuses and the LEO then tells him that his refusal is admissible against him. This confuses the defendant. The court suppresses the refusal finding that it is

not evidence of consciousness of guilt because the defendant may have believed he had a safe harbor.

CARBONE V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 682 (17th Cir 2012) – LEO observes the defendant's head bobbing while at a traffic signal. The defendant also slaps his face to remain awake. Court permits the traffic stop.

CIRESI V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 690 (17th Cir 2012) – The defendant is driving on a flat tire. There is no evidence in the record that the tire was likely to damage the road. Relying upon Baker v. Hayes, 3 So.2d 590 (Fla. 1941), the court rules that driving on a flat tire is not illegal unless there is evidence that it is likely to damage the road.

BROWN V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 699 (6th Cir 2012) – The LEO never observes the defendant drive. Rather the defendant's motorcycle is already stuck in a ditch filled with water and is inoperable when the LEO arrives. The defendant has already left and returned by the time the LEO arrives and begins his investigation. The court determines that there is a lack of competent substantial evidence that the defendant was driving while under the influence of alcohol at the time the motorcycle became inoperable.

MARROW V. STATE OF FLORIDA, DHSMV, 19 FLW SUPP. 704 (9th Cir 2012) – The hearing officer refuses to issue subpoena's. The DHSMV admits error and requests the appellate court remand for the issuance of the subpoena's. The court denies the request and finds that the testimony the witnesses would provide would be for an issue that wouldn't make a difference therefore, no due process issue exists.

BERG V. STATE, 19 FLW SUPP. 733 (2nd Cir 2012) – The defendant asks if it is possible to get out of jail quicker and she is given misinformation that if she blows, he'll be released as soon as she's below a 0.08 but if she refuses, then she has to be held for the minimum 8 hours. The court excludes her breath test relying upon a list of misinformation cases.

STATE V. MULLINS, 19 FLW SUPP. 747 (18th Cir 2012) – The defendant drives on the fogline 1 time. The court does an excellent job discussing the fogline cases from the different DCA's. The court also cites

to Townley. This is a must case to be familiar with when arguing a stop motion.

STATE OF FLORIDA, DHSMV, V. HOFER – 5 So.3d 766 (2ND DCA 2009) – This case sets out the DUE PROCESS RIGHTS and standards for an administrative suspension hearing. The court writes: "licenses are not to be taken away without that due process required by the 14th Amendment". Bell v. Burson, 402 U.S. 535 (1971). "Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty and property interests. Massey v. Charlotte County, 842 So.2d 142 (2nd DCA 2003). "Once a diver's license is issued … their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves State action that adjudicates important interests of the licenses. In such cases the licenses are not to be taken away without that procedural due process required by the 14th Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a *right* or a *privilege*". Bell v. Burson, 402 U.S. 535 (1971) and Mackey v. Montrym, 443 U.S. 1 (1979). *Procedural due process requires both fair notice and a real opportunity to be heard … at a meaningful hearing time and in a meaningful manner*. Keys Citizens for Responsible Government v. Fla. Keys Aqueduct Authority, 795 So.2d 940 (Fla. 2001). "To qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, *and not merely colorable or illusive*. Rucker v. City of Ocala, 684 So.2d 836 (1st DCA 1996).

STATE V. LAGHI – 18 FLW SUPP. 294 (6TH CIR 2010) – The defendant submitted to a breath test. The breath machine passed the monthly inspection the month before the defendant's breath test but failed it the month after and was removed from evidential use. The defendant moves to suppress and the court denies the motion finding that the rule requires that the machine be tested monthly which it was. The fact that the results show the machine failed the monthly inspection go to the weight of the evidence.

NAVIGATING THE FDLE SITES AND FINDING INTOXILIZER DOCUMENTS

By

Lasonya Lacy-O'Connell, Esq., Key West

Website Presentation

BREATH SUPPRESSION ISSUES

By

Trisha Pasdach, Esq., Miami

DUI Breath Motion FAQs

Q: When do I have a proper basis for a Motion to Suppress a breath reading?

A: Whenever law enforcement fails to substantially comply with FDLE regulations, you have the basis for a Motion to Suppress.

- Breath test results are *inadmissible* unless they substantially comply with Florida Department of Law Enforcement ("FDLE") administrative rules governing alcohol testing. Fla. Stat. § 316.1932 (2012).

Q: Where do I find the FDLE regulations governing alcohol testing?

A: Florida Administrative Code, Chapter 11D-8. Overview of most useful sections:

- 11D-8.002 – Definitions
- 11D-8.004 – When Department Inspection required (once per calendar year)
- 11D-8.006 – When Agency Inspection required (once per calendar month and if taken out of evidentiary use)
- 11D-8.007 – Where and how machines must be kept; Who can access machines; Breath test procedures
  - Machine must be in a secure location
  - Machine can only be accessed by authorized individuals
  - Breath tests must be conducted in compliance with *Form 37*
- 11D-8.0075 – Requirement that agency keep certain records for three-years
  - Does not affect admissibility of breath test, but good information to know
- 11D-8.008 – BTO and Agency Inspector permitting requirements

Q: Who has the burden in a Motion to Suppress a breath result?

A: When an individual challenges breath test results for lack of compliance with FDLE rules, the State bears the burden of proving substantial compliance. Dep't of Highway Safety & Motor Vehicles v. Wejebe, 954 So. 2d 1245 (Fla. 3d DCA 2007); Dep't of Highway Safety & Motor Vehicles v. Farley, 633 So. 2d 69 (Fla. 5th DCA 1994); State v. Reisner, 584 So. 2d 141, 145 (Fla. 5th DCA 1991) (state has burden of establishing substantial compliance where defendant alleges but does not present evidence of non-compliance.)

Q: What is the remedy if the court finds that the breath test results are not in substantial compliance?

A: If the State cannot establish substantial compliance, the breath test results are not competent, substantial evidence of the individual's blood alcohol level and must be excluded. Dep't of Highway Safety & Motor Vehicles v. Wejebe, 954 So. 2d 1245, 1249 (Fla. 3d DCA 2007).

Q: How do I challenge a breath test based on <u>maintenance issues</u>?

A: <u>Rule</u>: The machine must have an agency inspection once every calendar month and a department inspection once every calendar year. Fla. Admin. Code R. 11D-8.004; Fla. Admin Code R. 11D-8.006.

- Inspection records are posted by the FDLE on the FDLE Alcohol Testing website.

<u>Rule:</u> If a machine fails an agency inspection, it **must** be taken out of evidentiary use and sent to FDLE for maintenance. FDLE/ATP Form 39, paragraph 5.

- FDLE allows a "test" to be repeated if the machine fails that particular test during an agency inspection. *See* FDLE/ATP Form 39, paragraph 5. Many agency inspectors believe that this rule also allows them to repeat an entire inspection if the machine is found not to be in compliance. That interpretation is incorrect. *See* FDLE/ATP Form 39, paragraph 5.

Note: To determine whether the agency inspector followed proper protocol in the manner in which he/she conducted the inspection, refer to the Agency Inspector Course curriculum.

Q: How do I challenge a breath test based on <u>breath test procedures</u>?

A: When conducting a breath test, BTO's must follow procedures in Form 37. Fla. Admin. Code R.11D-8.007.

- Common Issues:
  - Did the officer comply with the twenty-minute observation period?
    - Once the defense raises the issue, the state bears the burden of proving compliance with the twenty-minute observation period. <u>Dep't of Highway Safety & Motor Vehicles v. Farley</u>, 633 So. 2d 69 (Fla. 5th DCA 1994).
    - The regulation does not require constant face to face observation. <u>Kaiser v. State</u>, 609 So. 2d 768 (Fla. 2d 1992).
  - Is there .02 compliance between sample readings?
  - Were the samples taken within 15 minutes of each other?

Note: If an error message occurred during a breath test, refer to the Breath Test Operator Course curriculum to determine whether the BTO followed proper protocol.

Q: How do I challenge a breath test based on <u>permit issues</u>?

A: <u>Rule</u>: Only individuals with valid BTO permits may conduct a breath test, and only individuals with a valid AI permit may conduct agency inspections. *See* Fla. Admin. Code R. 11D-8.008(4).

Obtain the officer's **Alcohol Testing Profile Sheet ("ATPS")** to determine when a permit was issued, when it was issued, and whether the officer took the proper courses required by FDLE to maintain his/her permit.

Issue spot the ATPS:

(1) Is there an active BTO or AI certification?
   a. If no, FDLE does not consider the officer's permit valid. Move to exclude the breath.

(2) If there is an active BTO or AI certification, did the officer take the appropriate course within the necessary timeframe?

For BTO Permits

- In order to *obtain* a valid permit, an officer must pass the Breath Test Operator Course. In order to *keep* that permit, an officer must take and pass the Breath Test Operator Renewal Course "by June 30 following the fourth permit anniversary date, and during each subsequent four-year cycle." Fla. Admin. Code R. 11D-8008(3). If the officer fails to meet this requirement, then he/she **shall not** perform any duties authorized by the permit. Fla. Admin. Code R. 11D.8008(4).
  - Florida courts have interpreted Rule 11D-8008(3)'s "anniversary date" provision as controlling **only** the first continuing education deadline. Once a permit is renewed, "the deadline for completing the continuing education is set at June 30, in a four-year cycle." State v. Mudge, 17 Fla. L. Weekly 1228b (Fla. 7th Cir. App. Aug. 3, 2010); Barton v. Dep't of Highway Safety & Motor Vehicles, 19 Fla. L. Weekly Supp. 163b (Fla. 4th Cir. App. Nov. 10, 2011); Young v. Dep't of Highway Safety & Motor Vehicles, 18 Fla. L. Weekly Supp. 1084 (Fla. 6th Cir. App. Ct. Aug. 24, 2011); *but see* State v. Espy, 19 Fla. L. Weekly Supp. 993a (Fla. 6th Cir. App. Ct. Aug. 10, 2012) (finding that FDLE interpretation of the continuing education requirement was not clearly erroneous and that the language in *Young* that states the opposite was judicial *dicta*).

For Agency Inspector Permits

- An AI permit is obtained by successful completion of the Agency Inspector course. Fla. Admin Code R. 11D-8.008(2)(b).
- FDLE requires an officer to have a valid BTO permit in order to take the Agency Inspector course. Fla. Admin Code R. 11D-8.008(2)(a).
  - If the officer's BTO permit lapsed ***before*** he/she completed the Basic Agency Inspector Course, then the officer failed to meet the qualifications for an AI permit under Rule 11D-8.008(2), and the permit is **invalid**.
- To maintain a valid permit, the officer must complete the continuing education requirements as described above.

DUI BREATH MOTIONS: FAQ

Trisha Pasdach
Assistant Public Defender

1320 NW 14th Street
Miami, FL 33125
305.545.1760
Tpasdach@pdmiami.com

Q: When do I have a proper basis for a Motion to Suppress a breath reading?

- A:Whenever law enforcement fails to substantially comply with FDLE regulations, you have the basis for a Motion to Suppress.
-
  - Breath test results are *inadmissible* unless they substantially comply with Florida Department of Law Enforcement ("FDLE") administrative rules governing alcohol testing. Fla. Stat. § 316.1932 (2012).

Q: Where do I find the FDLE regulations governing alcohol testing?

- A: Florida Administrative Code, Chapter 11D-8. Overview of most useful sections:
  - 11D-8.002 – Definitions
  - 11D-8.004 – When Department Inspection required (once per calendar year)
  - 11D-8.006 – When Agency Inspection required (once per calendar month and if taken out of evidentiary use)
  - 11D-8.007 – Where and how machines must be kept; Who can access machines; Breath test procedures
    - Machine must be in a secure location
    - Machine can only be accessed by authorized individuals
    - Breath tests must be conducted in compliance with *Form 37*
  - 11D-8.0075 – Requirement that agency keep certain records for three-years
    - Does not affect admissibility of breath test, but good information to know
- 11D-8.008 – BTO and Agency Inspector permitting requirements

Q: Who has the burden in a Motion to Suppress a breath result

- A:When an individual challenges breath test results for lack of compliance with FDLE rules, the State bears the burden of proving substantial compliance. *Dep't of Highway Safety & Motor Vehicles v. Wejebe*, 954 So. 2d 1245 (Fla. 3d DCA 2007); *Dep't of Highway Safety & Motor Vehicles v. Farley*, 633 So. 2d 69 (Fla. 5th DCA 1994); *State v. Reisner*, 584 So. 2d 141, 145 (Fla. 5th DCA 1991) (state has burden of establishing substantial compliance where defendant alleges but does not present evidence of non-compliance.)

Q: What is the remedy if the court finds that the breath test results are not in substantial compliance?

- A:If the State cannot establish substantial compliance, the breath test results are not competent, substantial evidence of the individual's blood alcohol level and must be excluded. *Dep't of Highway Safety & Motor Vehicles v. Wejebe*, 954 So. 2d 1245, 1249 (Fla. 3d DCA 2007).

Q: What issues do I look for?

- A: TOP THREE
  - Maintenance
  - Testing Procedures
  - Permits

Challenging a breath test based on maintenance issues

- Rule: The machine must have an agency inspection once every calendar month and a department inspection once every calendar year. Fla. Admin. Code R. 11D-8.004; Fla. Admin Code R. 11D-8.006.
  - Inspection records are posted by the FDLE on the FDLE Alcohol Testing website.

- Rule: If a machine fails an agency inspection, it **must** be taken out of evidentiary use and sent to FDLE for maintenance. FDLE/ATP Form 39, paragraph 5.
  - NOTE:
    FDLE allows a "test" to be repeated if the machine fails that particular test during an agency inspection. *See* FDLE/ATP Form 39, paragraph 5. Many agency inspectors believe that this rule also allows them to repeat an entire inspection if the machine is found not to be in compliance. That interpretation is incorrect. *See* FDLE/ATP Form 39, paragraph 5.

Additional Resource

- To determine whether the agency inspector followed proper protocol in the manner in which he/she conducted the inspection, refer to the Agency Inspector Course Curriculum.

Challenge a breath test based on breath test procedures

- Rule: When conducting a breath test, BTO's must follow procedures in Form 37. Fla. Admin. Code R.11D-8.007.
- Common Issues:
  - Did the officer comply with the twenty-minute observation period?
    - Once the defense raises the issue, the state bears the burden of proving compliance with the twenty-minute observation period. *Dep't of Highway Safety & Motor Vehicles v. Farley*, 633 So. 2d 69 (Fla. 5th DCA 1994).
    - The regulation does not require constant face to face observation. *Kaiser v. State*, 609 So. 2d 768 (Fla. 2d 1992).
  - Is there .02 compliance between sample readings?
  - Were the samples taken within 15 minutes of each other?

Additional Resource

- If an error message occurred during a breath test, refer to the Breath Test Operator Course curriculum to determine whether the BTO followed proper protocol.

Challenge a breath test based on permit issues

- Rule: Only individuals with valid BTO permits may conduct a breath test, and only individuals with a valid AI permit may conduct agency inspections. *See* Fla. Admin. Code R. 11D-8.008(4).
  - FIRST -- Obtain the officer's **Alcohol Testing Profile Sheet ("ATPS")** to determine when a permit was issued, when it was issued, and whether the officer took the proper courses required by FDLE to maintain his/her permit.

Issue Spot the ATPS

- (1) Is there an active BTO or AI certification?
  - If no, FDLE does not consider the officer's permit valid. Move to exclude the breath.

Issue Spot the ATPS

- (2) If there is an active BTO or AI certification, did the officer take the appropriate course within the necessary timeframe?
  - An officer who does not hold a valid permit at the time of the test or agency inspection **shall not** perform any duties authorized by the permit. Fla. Admin. Code R. 11D.8008(4).

Contact Info:

Trisha Pasdach
Assistant Public Defender
Law Offices of the Public Defender, Carlos J. Martinez
Tpasdach@pdmiami.com

DHSMV FORMAL REVIEWS

By

Susan Cohen, Esq. and David Robbins, Esq., Jacksonville

FORMAL REVIEW HEARINGS

I. STATUTES AND RULES

A. S. 322.2615 SUSPENSION OF LICENSE; RIGHT TO REVIEW

1. Most significant provisions

a. No requirement that person be under arrest and no references to 316.193 (except where the writers apparently forgot to remove it under the scope of review)

b. Authorizes appeal by law enforcement agencies.

c. Authorizes hearing officer to issue subpoenas for those persons "identified in documents in subsection (2)."

d. Authorizes Department to establish rules for the conduct of the hearing.

e. Requires hearing to be **scheduled** no later than thirty (30) days after request (which must be made within ten (10) days of arrest)

f. Provides for enforcement of subpoena for failure to appear

g. Provides that materials submitted by a law enforcement agency or correctional agency shall be in the record for consideration by the hearing officer and lists certain documents that **must** be contained in the record including an affidavit of probable cause. *Schwartz v. Dep't of Highway Safety and Motor Vehicles*, FLWSUPP2002SCHW(Fla. 15th Cir.Ct., Oct. 3, 2012); *Hill v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 11a (Fla. 9th Cir. Ct., Aug. 20, 2007); *Silvester v. Dep't of Highway Safety and Motor Vehicles*, 18 Fl. Law. Weekly Supp. 647b (Fla. 15th Cir. Ct. May 31, 2011)(where record established that "notary" officer testified he never placed witness under oath so not an affidavit.)

h. Requires that an unlawful blood alcohol level suspension should be removed if a person is found not guilty of the underlying violation of 316.193. (not applicable in refusal case)

B. S.322.64 SUSPENSION OF COMMERCIAL DRIVER'S LICENSE

1. Statute now applies to all CDL's even if driver not in a commercial vehicle at time of stop.

a. If you have a client with a prior administrative suspension that occurred before the change in the law in October 2008, this prior administrative suspension should not be used to permanently revoke the CDL unless they were actually in a commercial vehicle at the time of the arrest.

2. If officer does not issue notice at time of arrest, there will be a 30 day delay in suspension while the Department sends notice. This will result in a 13 month total suspension time.

3. Request this hearing at same time request under 322.2615 as they are two separate suspensions. (Technically the CDL suspension is a "disqualification.")

4. Scope of review for CDL disqualification review requires consideration of whether law enforcement officer had probable cause to believe the driver was in a commercial vehicle or has a CDL. If not set out in probable cause affidavit, do not ask any questions of officer about it at hearing, and move to invalidate for failure to meet burden of proof as required

by scope of review. See cases below regarding establishing probable cause that driver under 21 in s. 322.2616 hearings. The reasoning would be the same.

5. See also 322.61 for disqualifications relating to DUI convictions.

6. You can prevail on disqualification even if you lose as to general license suspension.

C. S. 322.2616 UNDER 21 SUSPENSIONS

1. Florida Statutes 322.2616 Suspension of license; persons under 21 years of age; right to review

a. 322.2616(7)(b) allows the driver to subpoena witnesses.

b. The scope of the review in these cases is different than in DUI cases. The scope of review includes the requirement that the evidence establish that the law enforcement officer had probable cause to believe that the driver was under the age of twenty-one (21). *See Dixon v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., April 9, 2002). In that case, there was no information in the affidavit from which the hearing officer could find that the officer had probable cause to believe that the driver was under 21 prior to requesting the breath test. The court reversed the suspension order. *See also Whiteside v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., Jan. 29, 2004).

c. Must have an affidavit of probable cause - *Williams v. Dep't. of Highway Safety and Motor Vehicles*, 14 Fla. L. Supp. 544 (Fla. 4th Cir. Ct., March 27, 2007).

d. Portable breath machine must be on conforming products list.

e. Argue issues related to stop as set out below. *See Sierra v. Dep't of Highway Safety and Motor Vehicles* (Fla. 8th Cir.Ct., Oct. 7, 2008) *cert den'd* (July 1, 2009); *Katzman v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 1006a (Fla. 9th Cir. Ct., June 30, 2010).

D. FLA. ADMININISTRATIVE CODE RULES FOR FORMAL REVIEW HEARINGS

1. 15A-6.002- Definitions

2. 15A-6.003 - Filing - document is filed when received by a clerk during business hours or during a hearing.

3. 15A-6.004 - Computation of time

a. Do not count day of event

b. If last day on weekend, holiday or other day the office is closed, time extends to first working day.

4. 15A-6.005- Notice of Suspension - specifies what must be included in notice

5. 15A-6.006 - Request for Review

a. Must be in writing on proper form

b. Must be postmarked or filed within ten (10) days of issuance of notice of suspension.

6. 15A-6.008 - Recusal

7. 15A-6.009 - Venue - in jurisdiction where notice issued unless waived.

8. 15A-6.010 – Motions

a. Includes authority to correct clerical errors in final orders

9. 15A-6.011 - Notice of Hearing, Prehearing Order

a. requires DMV to serve the driver with this order no later than 14 days prior to the hearing date.

b. Also addresses issuance of temporary driving permit

10. 15A-6.012 - Subpoenas

11. 15A-6.013 - Formal Review - This is a MUST READ.

12. 15A-6.014 - Preservation of Testimony - addresses the recording of the proceedings.

13. 15A-6.015 - Failure to Appear

a. "just cause" - extraordinary circumstances beyond the control of the driver, the driver's attorney, or the witness which prevent that person from attending the hearing

14. 15A-6.018 - Informal Review

15. 15A-6.019 - Judicial Review

16. 15A-6.020 - Forms

II. **THE ADMINISTRATIVE SUSPENSION**

A. "HARD TIME"

1. First offense

a. Breath test - 6 month suspension with 30 days hard time

b. Refusal - 12 month suspension with 90 days hard time

2. Second offense

a. Breath test - 12 month suspension [s. 322.2615 (8)(b)) with 30 days hard time (s. 322.2615(10)(b)]

b. Refusal –

1. If first offense was breath test, 12 month suspension with 90 days hard time [s. 322.2615(10)(a)]

2. If first offense was refusal, 18 month suspension [322.2615(8)(a))with18 months of hard time. (s. 322.271(2)(a)]

3. Third and subsequent offenses

a. Breath test - 12 month suspension with 12 months hard time [s. 322.271(2)(a)]

b. Refusal

1. If all prior offenses were breath test, 12 month suspension with 12 months hard time. [s. 322.271(2)(a)]

2. If any prior offense was refusal, 18 month suspension with 18 month hard time. [s. 322.271(2)(a)]

4. Disqualification of CDL.

a. Breath test or refusal - one year for first suspension; permanent after that - all hard time. [s. 322.64 (1)(b)1.b.]

III. **FORMAL REVIEW HEARINGS**

A. PROCEDURAL ISSUES

1. Request copies of all documents that are to be placed into the record when you request a hearing. Do not rely on the copies obtained from the State in discovery or from law enforcement agencies. Often there are errors in the documents that were forwarded to DMV that do not appear in other copies or vice versa.

2. After DMV receives your request for the formal review, you will receive a pre-hearing order which sets the date and time of the hearing. The rules also require that the hearing must be set within 30 days of the DMV's receipt of your request. (Note: send by certified mail for proof of date DMV received request.) If the deadline is missed, the license suspension will be invalidated upon proper objection at the hearing.

a. The driver must complete a pre-hearing statement which must be postmarked within 10 days of the date of the pre-hearing order. The pre-hearing statement requires you to list the issues that will be addressed at the hearing and gives you the opportunity to request witness subpoenas. Base your request on the documents provided. Be sure to add a reference to s. 322.64 to the prehearing statement when appropriate so there is no question that you requested both hearings.

b. Always request subpoenas whether you intend to serve them or not.

c. Form asks about time needed – put 2 hours if several witnesses. You will not get it but may affect their letting you run over or obtain continuance with a permit. Also object to arbitrary time limit.

3. The notice of suspension (which will probably be the DUI citation) will act as a temporary driving permit for ten (10) days after it is issued. Make sure your client understands that. **Be sure you leave the original citation with your client as it is their permit to drive**. Upon request for the formal review, a business permit shall be issued. (Fla. Admin. Code R. 15-A-6.011).

a. Under the rule, this permit shall be cancelled upon suspension being sustained.

b. Department grants permits that expire shortly after hearing date.

4. DMV has seven working days to enter a final order after a formal review hearing. Most circuit decisions find that there is no penalty for non compliance, *See Addison v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp.752a (Fla. 10th Cir. Ct., Sept. 5, 2001).

5. Authority for granting continuances is governed by Rules 15A-6.010 and 15A-6.015.

a. Motion by a witness who fails to appear must be in writing and contain "just cause" for the continuance. *Yant v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir.Ct., April 25, 2005).

b. Almost any request by law enforcement will be granted, but object that not "just cause" and ex parte granting of continuance without opportunity to object. *But see Vodar v. Dep't of Highway Safety and Motor Vehicles* 15 Fla. L. Weekly Supp.226 (Fla. 13th Cir. Ct., Jan. 11, 2008).

c. 15A-6.015 requires that prior notice of non-appearance must establish just cause, but does not address whether it must be in writing.

d. If the driver requests a continuance, the business permit will not be extended. (But note above where rule states should issue permit to expire only if suspension sustained) If an officer requests a continuance, the hearing officer will usually continue the business permit until the continued hearing. Fl. Admin. Code R. 15A-6.013(b).

e. Hearing officer may say no authority to extend permit, *but see Weatherred v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., April 14, 2005); *Ellis v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 1153a (Fla. 4th Cir. Ct., Sept. 8, 2010.)

6. Any conflicts between the rules and the statute must be resolved in favor of the statute. *Johnson v. Dep't of Highway Safety and Motor Vehicles*, 709 So.2d 623 (Fla. 4th DCA 1998) holds that, "An administrative agency is not permitted to enlarge, modify, or contravene the provisions of a statute. Where the agency adopts a rule that conflicts with the statute, the statute prevails." See also *Willette v. Air Products*, 700 So. 2d 397 (Fla. 1st DCA 1997).

a. *Estraviz v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., July 15, 1997) *cert. den'd.* (Fla. 1st DCA 1997)("Just as the Respondent is entitled to strict compliance with these rules so is the Petitioner. ...There was no argument made that the rules are not to be strictly complied with by both Petitioner and the Department")

B. PREPARATION FOR THE FORMAL REVIEW HEARING

1. Request subpoenas for everyone listed in the documents. You are entitled to a subpoena for all listed persons. *Lee v. Dep't of Highway Safety and Motor Vehicles*, 4 So. 3d 754 (Fla. 1st DCA 2009); *Dep't of Highway Safety and Motor Vehicles v. Auster*, 52 So. 3d 802 (Fla. 5th DCA 2011). You may not serve all of them, but request them all. It may create an issue of appeal if one is denied, and you do not want the hearing officer to be able to determine your strategy ahead of time.

2. Prior to determining who to serve to appear, review all documents that have been forwarded to you from DMV to look for defects in the documents which would result in an automatic invalidation. Have several people within your office review documents for issues. If

there are defects, do not subpoena any officers because if you subpoena an officer to appear at the hearing, he or she can fix the defect. - **BUT BEWARE OF S. 322.26151** (Department to review documents for error prior to the hearing). If you show up to hearing and defects are corrected, object and request continuance with a permit.

3. Defects include the following:

a. errors in the affidavits - See Section 4. below.

b. inconsistencies in documents - See *Hall v. State*, (Fla. 18th Cir. Ct., July 9, 1996)(If the Department chooses to rely on documents alone, and the documents are inconsistent, the suspension cannot be sustained absent sworn testimony explaining the discrepancies.); *Trimble v. Dep't of Highway Safety and Motor Vehicles*, 821 So. 2d 1084 (Fla.1st DCA 2002) *reh. den'd* (Fla. 1st DCA July 26, 2002)(insufficient evidence from conflicting documents that implied consent read prior to refusal); *McClung v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Oct. 27, 2003) *cert. den'd*. 878 So. 2d 480 (Fla. 1st DCA 2004); *McKinney v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 6a (Fla. 7th Cir. Ct., Oct. 13, 2006*); Valerio v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 7th Cir. Ct., Jan. 24, 2008); *Jannotti v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 39b (Fla. 18th Cir. Ct., June 26, 2006); *Hogan v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 529a (Fla. 9th Cir. Ct., Oct. 31, 2005); *Gass v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 430a (Fla. 20th Cir. Ct., April 26, 2001)(wherein the court found that the failure to fill in the time and place of offered test on the refusal affidavit rendered the evidence that the driver was requested to take a test after being advised of the consequences insufficient); *Allbright v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., Sept. 30, 2004); *Jackson v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly 532 (Fla. 9th Cir. Ct., March 19, 2007); *Cellamare v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 908a (Fla.6th Cir. Ct., April 13, 2007); *Ojiem v. Dep't of Highway Safety and Motor Vehicles*,14 Fla. L. Weekly Supp. 908a (Fla. 6th Cir. Ct., March 26, 2008) *cert den'd* (Fla. 2d DCA Sept. 3, 2008). *But see Allen v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 313a (Fla. 7th Cir. Ct., Oct. 10, 2006); *Thomas v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 1143a (Fla. 6th Cir. Ct., Sept. 22, 2008)*; Soles v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 1144a (Fla. 7th Cir. Ct., Sept. 22, 2008); *Flanary v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 1078 (Fla. 11th Cir. Ct., July 21, 2010).

c. lack of proof of elements in paperwork;

1. conclusory statements regarding driving, basis for stop, or impairment-officer came to that conclusion insufficient to establish probable cause. *Dep't of Highway Safety and Motor Vehicles v. Roberts*, 938 So. 2d 513 (Fla. 5th DCA 2006) *reh. den'd* (Fla. 5th DCA Aug. 15, 2006); *Dep't of Highway Safety and Motor Vehicles v. Brass*, 906 So. 2d 1224 (Fla. 1st DCA 2005); *Blizzard v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 266a (Fla. 4th Cir. Ct. February 1, 2001); *Cato v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 267a (Fla. 4th Cir. Ct., Feb. 22, 2001); *Clemons v. Dep't of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 949a (Fla. 4th Cir. Ct., Aug. 19, 2004) *cert. den'd* (Fla. 1st DCA 2005); *Miller v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 610 (Fla. 4th Cir. Ct., May

7, 2007); *Panjevic v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. Weekly Supp. 415 (Fla. 4th Cir. Ct., March 2, 2007)*cert. den'd* (1st DCA Oct. 25, 2007); *Compton v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 1037a (Fla. 4th Cir. Ct., Sept. 22, 2008).

2. stop and detention - Always review statute when basis for stop is civil infraction to be sure that actions reported are actually covered and/or prohibited by the statute. *Wilker v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 34b (Fla. 17th Cir. Ct., Sept. 25, 2006). These issues are more fully addressed below.

3. accident report privilege (See Section E (4) for full discussion)

4. chronology of events must be clear - *Carter v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 708 (Fla. 4th Cir. Ct., May 15, 2007)

5. actual physical control – Officer must see all elements of offense to arrest for misdemeanor. *T.L.M. v. State*, 371 So. 2s 688 (Fla. 1979); *Morgan v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Feb. 1, 2011).

d. refusal or breath test –

1. if client blows and one test is above and one is below .08, DMV will invalidate the suspension **only if** review is requested and objection is made.

2. affidavits - See Section 4 below

3. maintenance and breath test paperwork - Online access at FDLE website - www.fdle.state.fl.us/atp/ See. *Dep't of Highway Safety and Motor Vehicles v. Falcone*, 983 So. 2d 755 (Fla. 2d DCA 2008) and *State v. Buttolph*, 969 So. 2d 1209 (Fla. 4th DCA 2007) wherein the district courts appear to say that only need the one most recent, and therefore do not need annual to satisfy burden.

4. Substantial compliance - remember the Department has burden -See *Dep't of Highway Safety and Motor Vehicles v. Farley*, 633 So.2d 69 (Fla. 5th DCA 1994) and *State v. Jones*, 7 Fla. L. Weekly 747, (Fla. 11th Cir. Ct., Aug. 8, 2000). In that case the breath test result was suppressed because state did not prove the 20 minute observation

5. *Hillsborough County Sheriff's Office v. Staver*, 16 Fla. L. Weekly Supp. 398 (Fla. 13th Cir. Ct, Mar. 12, 2009) - If maintenance document shows a problem such as "ambient fail" record fails to provide competent substantial evidence of unlawful breath test result.

6. The refusal must be willful - In *Wolok v. Dep't of Highway Safety and Motor Vehicles* 1 Fla. L. Weekly Supp. 204a (Fla. 11th Cir. Ct., 1992) the court found that there was not competent and substantial evidence of a willful refusal where the petitioner testified that he had a physical inability to give a urine sample, and the Department did not produce evidence in rebuttal. *See also Brass v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 5a (Fla. 15th Cir. Cr., Oct. 5, 2011), *Paradis v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp.131a (Fla. 13th Cir. Ct., Nov. 13, 2007) and *Stack v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 322 (Fla. 11th Cir. Ct., Jan. 1, 2006) – where probable cause affidavit says that refused urine because could not give sample, no refusal. In *Kenyon v. Dep't of*

Highway Safety and Motor Vehicles, (Fla. 4th Cir. Ct., July 30, 2009) the circuit court denied the petition based upon the failure to establish that the driver was unable to blow thereby affirming that refusal must be willful. *But see Solomon v. State*, 538 So. 2d 931 (Fla. 1st DCA 1989), wherein the driver received a broken nose while in police custody. While there was some dispute as to whether the driver received the broken nose before or after the breath testing procedures, it was undisputed that the driver refused to provide a breath sample. The appellate court was not concerned with when the driver's nose was broken and upheld the driver's license suspension, finding that "the statutory reasons justifying refusal to take the breathalyzer test do not include a broken nose."

7. *Dep't of Highway Safety and Motor Vehicles v. Cherry*, 91 So. 3d 849 (Fla. 5th DCA 2011– Where driver attempted to submit to breath test but machine said insufficient volume, properly considered a refusal.

8. Several district courts of appeal have found that the Department does not have to establish that there was a valid test available in a refusal case. *Dep't of Highway Safety and Motor Vehicles v. Riggen*, 654 So. 2d 221 (Fla. 1st DCA 1995); *Dep't of Highway Safety and Motor Vehicles v Berry*, 619 So. 2d 976 (Fla. 2d DCA 1993); *Conahan v. Dep't of Highway Safety and Motor Vehicles*, 619 So. 2d 988 (Fla. 5th DCA 1993); *Dep't of Highway Safety and Motor Vehicles v. Coleman*, 787 So. 2d 90 (Fla. 2d DCA 2001).

9. blood tests - look to see if authorized by statute - either serious bodily injury or appears for treatment and breath or urine impractical or impossible. Also under 316.1933, driver has to have "caused" the injury which is interpreted as having had to have caused the accident. *Lukaj v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 563 (Fla. 4th Cir. Ct., March 19, 2010); *Verner v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly Supp. 150a (Fla. 4th Cir. Ct. Feb. 6, 2003) *cert. den'd* 926 So. 2d 463 (Fla. 1st DCA 2006); *Vaughn v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 519 (Fla. 6th Cir. Ct., Mar. 20, 2006); *Dente v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly 1158 (July 22, 2010).

10. Under s. 316.1932 breath or urine must be impracticable or impossible. *See Doran v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 12b (Fla. 15th Cir. Ct. Aug. 30, 2011); *State v. Bice*, 19 Fla. L. Weekly Supp. 661b (Fla. Palm Bch. Cty. Ct., April 25, 2012); *Jordan v. Dep't of Highway Safety and Motor Vehicles*, FLWSUPP 1910JORD (Fla. 11th Cir. Ct., July 12, 2012)(where driver injured during police encounter blood test not lawful under this section.). *But see Quinn v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., Jan. 20, 2012) *cert denied* 90 So. 3d 280 (Fla. 1st DCA 2012)(circuit court found that delivery to hospital staff sufficient to show prima facie impossible or impractical.).

11. No authority to request <u>breath</u> when no probable cause impaired by <u>alcohol</u>. *Gruszeczki v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., July 8, 2008); *Carillon v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct., Sept. 21, 2011) *cert. denied* 95 So. 3d 901(Fla. 1st DCA 2012); *Stachura v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 1073a (Fla. 15th Cir. Ct., Aug. 25, 2011). The

same should apply to a request for urine – must have pc for drugs. If no pc, no refusal if say no.

12. Request that driver submit to a test of her "breath, blood, or urine" did not mislead driver into thinking that she was required to submit to a test more invasive than the breath test authorized by statute *Nader v. Florida Dept. of Highway Safety & Motor Vehicles*, 87 So. 3d 712 (Fla. 2012), reh'g denied (May 4, 2012).

13. Warrants for blood test for drivers who have refused breath have been upheld as unlawful, unless felony DUI. *State v. Geiss*, 70 So. 3d 642 (Fla. 5th DCA 2011) reh'g denied (July 22, 2011), *review granted*, 70 So. 3d 587 (Fla. 2011) and *review dismissed*, 88 So. 3d 111 (Fla. 2012). But, such blood tests are not obtained under Implied Consent law – should not result in suspension.

e. When you get to the hearing, object to any document which contains a defect and move to invalidate the suspension based on the Department's inability to meet its burden without that document.

f. Refusal must be subsequent to arrest. *Dep't of Highway Safety and Motor Vehicles v. Whitely*, 846 So. 2d 1163 (Fla. 5th DCA 2003); *Lampert v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 256a (Fla. 11th Cir. Ct., Jan. 6, 2011).

4. Errors in Affidavits

a. Check both the probable cause affidavit and the breath or refusal affidavits for invalid notary. **But note**: If valid affidavit, but probable cause not complete in affidavit, hearing officer may look to other documents to establish probable cause. *Dep't of Highway Safety and Motor Vehicles v. Currier*, 824 So. 2d 966 (Fla. 1st DCA 2002); *Keiser v. Dep't of Highway Safety and Motor Vehicles* , 13 Fla. L. Weekly Supp. 324 (Fla. 13th Cir.Ct. Dec. 22, 2005); *Caldwell v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 7th Cir. Ct. Nov. 3, 2010).

b. *Marcelo v. Department of Highway Safety and Motor Vehicles*, 7 Fla. L. Weekly Supp. 590, (Fla. 11th Cir. Ct., June 20, 2000 (affidavit notarized by a public service aide is not sufficient.)

c. The person attesting to the affidavit must affix their signature, not merely their initials. Section 92.50, Florida Statutes states that in order for an affidavit to be valid, the jurat shall be authenticated by the signature of the individual notarizing the document. - See *Kohl v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Sept. 13, 2001).

d. See also *Sherry v. Dep't of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 1113a (Fla. 4th Cir. Ct., Sept. 6, 2005) and *Hurley v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 1041a (Fla. 5th Cir. Ct., Jan. 4, 2008) as to errors/conflicts in the affidavit.

5. If the refusal affidavit is facially defective (ie. no signature, improper jurat), you will get your license back unless another sworn document states that the driver refused after being read implied consent. *See Dep't of Highway Safety and Motor Vehicles v. Perry*, 751 So. 2d 1277 (Fla. 5th DCA 2000). In that case, the court ruled that there must be sworn evidence that a breath, urine or blood test was requested, implied consent warnings were given, and the person arrested refused to submit although it does not have to be a "refusal" affidavit. That court further held that the general statement that implied consent warnings were given is sufficient. See also *State v. Johnston*, 553 So. 2d 730 (Fla. 2d DCA 1989).

6. *Gupton v. Dep't of Highway Safety and Motor Vehicles*, 987 So. 2d 737 (Fla. 5th DCA 2008) - minor technical defects do not render affidavit void such as the failure to indicate whether notary or correctional officer.

C. LITIGATION TIPS

1. DMV has the burden of proof. *Dep't of Highway Safety and Motor Vehicles v. Farley*, 633 So.2d 69 (Fla. 5th DCA 1994); *Vernon v. State*, 558 So. 2d 535 (Fla. 1st DCA 1990); *Deel v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Aug. 21, 1997) *cert. den'd*. (Fla. 1st DCA 1997); *Dep't of Highway Safety and Motor Vehicles v. Alliston*, 813 So. 2d 141 (Fla. 2d DCA 2002)*; Allbright v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Sept. 30, 2004); *Baker v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., Apr. 3, 1998), *Chapman v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 268a (Fla. 4th Cir. Ct., Feb. 7, 2001) *cert. den'd* (Fla. 1st DCA 2001); *Kenney v. Dep't of Highway Safety and Motor Vehicles*, 7 Fla. L. Weekly Supp. 574a (Fla. 4th Cir. Ct., May 23, 2000) *cert. den'd* (Fla. 1st DCA 2000.)

a. There is also a discussion regarding the burden of proof in *Dep't of Highway Safety and Motor Vehicles v. Mowry*, 794 So. 2d 657 (Fla. 5th DCA 2001). Although the court does not specifically state that the Department has the burden of proof, the clear implication in that case is that the burden of proof is on the Department. *See also Dep't of Highway Safety and Motor Vehicles* v. *Wejebe*, 954 So. 2d 1245 (Fla. 3d DCA 2007); *Alejandro v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 738 (Fla. 9th Cir. Ct., May 8, 2007); *Mattia v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 736 (Fla. 9th Cir. Ct., April 16, 2007); *Rozen v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 736 (Fla. 9th Cir. Ct., April 23, 2007); and *State v. Jones*, 7 Fla. L. Weekly 747 (Fla. 11th Cir. Ct., Aug. 8, 2000).

2. Must make objections at time of the hearing. *Lankford v. Dep't of Highway Safety and Motor Vehicles*, 956 So. 2d 527 (Fla.1st DCA 2007); *Dep't of Highway Safety and Motor Vehicles* v. *Boesch*, 979 So. 2d 1024 (Fla. 3d DCA 2008).

3. Witnesses who fail to appear.

a. *Dep't of Highway Safety and Motor Vehicles v.Chamizo*, 753 So. 2d 749 (Fla. 3d DCA 2000), is a must read on this issue. *Chamizo* sets out requirements of a proffer.

b. If a police officer is served with a subpoena and cannot attend the hearing, he or she must contact the hearing officer and ask for a continuance giving good cause. When you get to the hearing, the hearing officer will inform you of the continuance, and if the driver is otherwise eligible for a hardship permit, the permit will be extended until the new hearing.

c. If the police officer waits until after the hearing to notify the hearing officer that they could not attend the hearing, this is considered a "failure to appear". Move to invalidate the suspension if any witness fails to appear. In order for the officer to obtain a continuance of the hearing after failing to appear, the police officer must file a written request for a continuance within 48 hours after the close of the hearing. The police officer must provide "just cause" in writing for his or her failure to appear. If just cause is provided, the driver will get an extension of his or her hardship permit.

d. Repeated continuances for officers to appear - In *Whitehead v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 11th Cir. Ct., Feb. 28, 2008) circuit court found it was a violation of due process. *See also Burrell v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 1060a (Fla. 9th Cir. Ct., Sept. 25, 2012).

e. In the past, the Department would invalidate for a failure of the arresting officer or breath test operator to appear. Now they require that in cases where an officer does not request a continuance, but simply ignores the subpoena, a driver go to circuit court to enforce the subpoena.

D. HOT ISSUES

1. Consideration of Lawfulness of Arrest

The Department has apparently conceded that going forward the lawfulness of arrest must be considered in all formal review hearings.

2. Is breath test operator certified? Question of what does the rule require in terms of continuing education requirements. *See Young v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 1084a (Fla. 6th Cir. Ct., Aug. 24, 2011); *Barton v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Nov. 10, 2011) *cert denied* 86 So. 3d 1117 (Fla.1st DCA 2012); *Rivera v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 1048a (Fla. 15th Cir. Ct., Sept. 5, 2012)*; Boivan v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 1004a (Fla. 15th Cir. Ct., Sept. 5, 2012).

a. Driver entitled to subpoena duces tecum for certification documents to rebut assertion that certified. *Hedley v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 515 (Fla. 4th Cir. Ct., Mar. 19, 2012); *Patel v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., June 27, 2012).

b. Breath test operator's assertion certified not sufficient to overcome evidence put forth that not properly certified. *Holcomb v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Dec. 10, 2012)

3. Enforcement of subpoenas in circuit court.

a. Must file in circuit where witness lives.

b. Expensive if have to file in new proceeding. If multiple witnesses, you can include them in the same petition if they all live in the same county.

c. Send a courtesy copy to the judge with a proposed order, and copies to the witness, hearing officer, and DMV legal. The witness should be served by process server.

d. Try to get a tentative date for new hearing so that this date can be provided to the court.

e. See *Lankford v. Dep't of Highway Safety and Motor Vehicles*, 956 So. 2d 527 (Fla.1st DCA 2007) and *Kubasak v. Dep't of Highway Safety and Motor Vehicles*, 957 So. 2d 15 (Fla. 5th DCA 2007) which seem to state in *dicta* that enforcement is remedy for failure to appear. *See Dep't of Highway Safety and Motor Vehicles v. Robinson*, 93 So. 3d 1090 (Fla. 2d DCA 2012).

f. In *Pfleger v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 706a (Fla. 6th Cir. Ct., May 20, 2011) cert. den'd (Fla. 2d DCA Oct. 24, 2011), however, the circuit court found that the requirement that a driver proceed with an enforcement action

constitutes a denial of the driver's right to a timely hearing within the 30 days as required by law. *But see Saxlehner v. Dep't of Highway Safety and Motor Vehicles* 2012 WL 3316828 (Fla. 3d DCA Aug. 15. 1012). In *Saxlehner*, however, Court based finding on fact that hearsay is okay at formal review hearing, and not on due process issue of denial of opportunity to rebut the evidence. In *Dep't of Highway Safety and Motor Vehicles v. Robinson*, 93 So. 3d 1090 (Fla. 2d DCA 2012) the Second District Court of Appeal denied the Department's petition recognizing that invalidation for failure to appear was not a departure from the essential requirements of law. Issue certified to Supreme Court in *Robinson* and *Dep't of Highway Safety & Motor Vehicles v. Ramnarine*, 37 Fla. L. Weekly D2720 (Fla. 2d DCA 2012).

g. Circuit court can only order enforcement of subpoena issued by hearing officer. There is no authority for circuit court to issue subpoena, *Elias v. Dep't of Highway Safety and Motor Vehicles*, 997 So. 2d 1172 (Fla. 3d DCA 2008). If hearing officer excuses officer or strikes subpoena, enforcement not an option.

h. Circuit court, however, is only entity that can enforce a subpoena as hearing officer has no contempt power. *State v. Leyva*, 65 So. 3d 1137 (Fla. 3d DCA 2011).

i. Driver entitled to permit during enforcement period. *Carballosa v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 569a (Fla. 4th Cir. Ct., Feb. 28, 2011).

4. Accident Report Privilege – Difference between report itself and "statements" contained in the report

5. Hearing Officers have begun to refuse to accept exhibits from drivers based upon a lack of authentication because not submitted by law enforcement. In many cases documents are self-authenticating or authenticated by a different witness. They do not understand, for example, that a picture, or video, does not have to be authenticated by the person who actually took it.

6. Hearing Officers are placing uncertified driving record into the record of the hearing. There is no legal basis to do so since not certified, not authenticated, and not submitted by law enforcement.

7. Venue – Per own rule, hearings must be held in circuit where notice of suspension issued. Department was doing telephonic hearings outside the circuit. Numerous decisions saying cannot do that. The Department proposed new rule, but no change yet. Have begun holding hearings in proper venue now but still contesting appeals of older cases where they did not.

8. Telephonic Hearings. Some courts have held that hearings cannot be held telephonically. *Fernandez v. Dep't of Highway Safety and Motor Vehicles*, Case No. 2011-CA-1300-K (Fla. 16th Cir. Ct., Feb 10, 2012); *Rosa v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 803a (Fla. 11th Cir. Ct., June 15, 2012). *But see dicta* in *Dep't of Highway Safety and Motor Vehicles v. Edenfield*, 58 So. 3d 904 (Fla. 1st DCA 2011)

E. LEGAL GROUNDS FOR INVALIDATION

1. Stop and seizure issues. – read *Beahan v. State*, 41 So. 2d 1000 (Fla. 1st DCA 2010) on reasonable suspicion to stop. Reasonable suspicion is more than a bare suspicion. *Major v. State*, 70 So. 3d 655 (Fla. 1st DCA 2011); *Gipson v. State*, 537 So. 2d 1080 (Fla. 1st DCA 1989) and can not be proven through evidence obtained after the stop. *Ray v. State*, 40 So. 3d 95 (Fla. 4th DCA 2010); *D'Agostino v. State*, 310 So. 2d 12 (Fla. 1975). See also *Fisher v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., Oct. 1, 2002). But beware of

State v. Ameqrane, 39 So. 3d 339 (Fla. 2d DCA 2010) *review den'd* 67 So. 3d 198 (Fla. 2011); and *State v. Castaneda*, 79 So. 3d 41 (Fla. 4th DCA 2011) and *Origi v. State*, 912 So. 2d 69 (Fla. 4th DCA 2005).

a. Look at the basis for the stop asserted by the officer. In *Dobrin v. Dep't of Highway Safety and Motor Vehicles*, 874 So. 2d 1171(Fla. 2004), the Supreme Court reversed the decision of the Fifth District Court of Appeal and upheld the decision of the circuit court. In its decision, the Supreme Court found that the circuit court had applied the correct law by considering whether the particular officer in the case had probable cause to initiate the stop. The Supreme Court further noted that by considering whether a reasonable officer under similar circumstances would have stopped the petitioner, the district court relied on a principle of law that is no longer valid. *See also*: *Tupas v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Dec. 21, 2004); *Utley v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., May 5, 2005) *cert den'd*, 940 So. 2d 698 (Fla. 1st DCA 2006); *Croasmun v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly Supp. 152 (Fla. 7th Cir. Ct., Mar. 27, 2002). *But see Dep't of Highway Safety and Motor Vehicles v. Maggert*, 941 So. 2d 431 (Fla. 1st DCA 2006). Also remember that a specific statute applies over a more general statute. *Stoletz v. State*, 875 So. 2d 572 (Fla. 2004).

b. Anonymous tips - Watch for reasonable suspicion based on anonymous tips.

1. *Baptiste v. State*, 995 So. 2d 285 (Fla. 2008); *Solino v. State*, 763 So. 2d 1249, (Fla. 4th DCA 2000); *State v. Campbell*, 10 Fla. L. Weekly Supp. 46 (Fla. Dade Cty. Ct., Nov. 21, 2002); *Williams v. State*, 721 So. 2d 1192, (Fla. 1st DCA 1998); *Walther v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Sept. 13, 2001)(wherein the Court found that information from anonymous informants that the petitioner was "drunk and cussing everybody" was not a sufficient basis to stop him.).
2. In *Rivera v. State*, 771 So. 2d 1246 (Fla. 2d DCA 2000), an unidentified motorist had reported that he observed two vehicles exchange gunfire. Although the motorist had included the tag number of one of the vehicles in his description, this tip was not sufficient to stop the vehicle.
3. In *Morse v. State*, 730 So. 2d 352 (Fla. 2d DCA 1999), police received an anonymous tip that there was a white male with dark hair and beard smoking illegal drugs in a tan Ford sedan in the parking lot of a specific apartment complex. The officer who responded to the call observed a person and a vehicle that matched the description exiting the parking lot using an overdrive or passing gear. He stopped the vehicle. Although the use of the wrong gear may have been sufficient to validate the stop, the district court found that since the officer testified that the only reason he stopped the defendant was the anonymous tip, the drugs which were subsequently found in the vehicle had to be suppressed.
4. *State v. Wheeler*, 7 Fla. L. Weekly Supp. 752 (Fla. Palm Beach Cty. Ct., Sept. 7, 2000), the motion to suppress was granted where an officer had stopped the defendant after having been advised that the defendant appeared to be drunk and that defendant had stated to the tipster that she was "toasted".
5. If tipster readily available, not anonymous – *Dep't of Highway Safety and Motor Vehicles v. Ivey*,73 So. 3d 877 (Fla. 5th DCA 2011).

c. Failure to Maintain a Single Lane

1. The main case on this issue is *Crooks v. State*, 710 So.2d 1041(Fla. 2d DCA 1998). In *Crooks*, the court found that the actions of the driver must create a reasonable safety concern....there is no infraction when there are no other individuals impacted.

2. See also; *Jordan v. State*, 831 So. 2d 1241 (Fla. 5th DCA 2002); *Hurd v. State*, 985 So 2d 600 (Fla. 4th DCA 2007) *but see Jones v. Dep't of Highway Safety and Motor Vehicles*, 935 So. 2d 532 (Fla. 3d DCA (2006)

3. *Williamson v. Dep't of Highway Safety and Motor Vehicles*, 933 So. 2d 665 (Fla. 1st DCA 2006)(First DCA appears to recognize that must at least endanger other traffic)

4. *Yanes v. State*, 877 So. 2d 25 (Fla. 5th DCA 2004) – does not completely overcome *Crooks* and *Jordan.*

5. In *Pernal v. State,* 7 Fla. L. Weekly Supp. 585, (Fla. 9th Cir. Ct., June 5, 2000), the court found that weaving within the lane and drifting outside the lane on several occasions was sufficient for reasonable suspicion of DUI and did not even address question of whether facts were sufficient for failure to maintain a single lane.

6. In *Kenney v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct, May 23, 2000) *cert. den'd* (Fla. 1st DCA 2000), the driver was driving through a construction area. Although the driver did cross the center lane two times and the outside lane one time, there was insufficient evidence to justify stop as there was insufficient evidence that lanes were clearly marked. The First DCA denied certiorari review.

7. In *State v. Walker*, 8 Fla. L. Weekly 389 (Fla. Pinellas Cty. Ct., March 13, 2001), the arresting officer testified that the driver's tires touched the lane-dividing lines on two occasions. These actions did not rise to the level of a violation of law where no traffic was affected and the driver never left his own lane. *See also Duke v. State*, 82 So. 3d 1155 (Fla. 2d DCA 2012);*United States v. Smith*, 799 F.2d 704 (11th Cir.1986); *State v. Culpepper*, 15 Fla. L. Weekly Supp. 585c (Fla. 17th Cir. Ct., Mar. 4, 2008); *State v. Fodor*, 14 Fla. L. Weekly Supp. 34a (Fla. 17th Cir. Ct, Sept. 20, 2006); *Wideman v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly 254 (Fla. 6th Cir. Ct., Aug. 11, 2005); *State v. Meyers*, 6 Fla. L. Weekly Supp. 646a (Fla. Pinellas Cty. Ct., May 11, 1999); *State v. Stahr*, 4 Fla. L. Weekly Supp. 225a (Fla. Clay Cty. Ct., July 16, 1996); *State v. Porterfield*, 6 Fla. L. Weekly Supp. 79a (Fla. 4th Cir. Ct., Sept. 25, 1998); *Noorigan v. State*, 7 Fla. L. Weekly Supp. 369a (Fla. Duval Cty. Ct., Feb. 23, 2000); *State v. Garman*, 7 Fla. L. Weekly Supp. 45b (Fla. St. John's Cty Ct., Sept. 3, 1999); *State v. Alford*, 2 Fla. L. Weekly Supp. 483a (Fla. Broward Cty. Ct., Sept. 19, 1994); *State v. Battin*, 6 Fla. L. Weekly Supp. 771b (Fla. Duval Cty. Ct., Aug. 17, 1999); *Delafe v. State*, 8 Fla. L. Weekly Supp. 594 (Fla. 11th Cir. Ct., July 24, 2001).

d. Violation of Traffic Control Device - s. 316.074

Review s. 3B.04 of the Federal Highway Administration Manual on Uniform Traffic Control Devices - Can find on the internet. This has been incorporated by rule in Fla. Admin. Code. R.

14-15.010 as part of the Fla. rules of transportation. *See State v. Sestilio,* 15 Fla. L. Weekly Supp. 60 (Fla. Leon Cty. Ct., Oct. 8, 2007), *State v. Lutz,* (Fla. Duval Cty. Ct., April 4, 2005), *State v. Badran*, 15 Fla. L. Weekly 86 (Fla. Volusia Cty. Ct, Nov. 14, 2007);*State v. Singer*, 15 Fla. L. Weekly 62 (Fla. Duval Cty, Ct. Oct. 1, 2007); *State v. Parra,* 14 Fla. F. Weekly 986 (Fla. Broward Cty. Ct., July 18, 2007); *State v. Albershinski*, (Fla. Duval Cty. Ct. July 9, 2010).

e. Failure to Dim Headlights - *See State v. Clark,* 511 So. 2d 726 (Fla.1st DCA 1987).

f. Sleeping behind the wheel - *See Danielewicz v. State*, 730 So. 2d 363, (Fla. 2d DCA 1999), in which the defendant was asleep behind the wheel of her running vehicle. It was only after the officer woke her up and ordered her out of the vehicle that he observed any evidence of impairment. That court held that the repeated attempts by the officer to get her out of the vehicle constituted a stop for which he had no reasonable suspicion. *See also: Parsons v. State*, 825 So. 2d 406 (Fla.2d DCA 2002); *Forte v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly Supp. 474 (Fla.11th Cir. April 1, 2003) *State v. Campbell*, 10 Fla. L. Weekly Supp. 46 (Fla. Dade Cty. Ct., Nov. 21, 2002); *State v. Burdeshaw*, 9 Fla. L. Weekly Supp. 58 (Fla. 14th Cir. Ct., Nov. 8, 2001); *State v. Gonzalez*, 5 Fla. L. Weekly Supp 628 (Fla. 17th Cir. Ct., May 19, 1998); *State v. Peacock*, 9 Fla. L. Weekly Supp. 554 (Gadsden Cty. Ct., May 17, 2002)*; Ben-Asher v. Dep't of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 630 (Fla.11th Cir. April 5, 2005) *but see: State v Conyer*, 6 Fla. L. Weekly Supp. 161 (Fla. 17th Cir. Ct., Dec. 27, 1998); *Zuniga v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 13th Cir. Ct., May 20, 2002).

g. Lawfully parked - *Popple v. State*, 626 So. 2d. 185 (Fla. 1993); *Miranda v. State*, 816 So. 2d 132 (Fla. 4th DCA 2002); *State v. Holloman*, 824 So. 2d 901 (Fla. 1st DCA 2002)*; Smith v. State*, 87 So. 3d 84 (Fla. 4th DCA 2012) *Thomas v. State*, 10 Fla. L. Weekly Supp. 58 (Fla. Palm Bch. Cty. Ct., Nov. 26, 2002); *Wilson v. Dep't of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 1281 (Fla. 9th Cir. Ct., Oct. 12, 2004); *Buchanan v. State*, (Fla. 4th Cir. Ct., Dec. 16, 2010).

h. Stop too long at stop sign/flashing light - See *Jones v. State*, 8 Fla. L. Weekly Supp. 689a, (Fla. 11th Cir. Ct., Aug. 9, 2001) wherein the circuit court found that sitting at a blinking light at 4:19a.m. for 41 seconds when there was no other traffic coming insufficient basis for stop. This case contains a good discussion about suspicions being alleviated by other observations.

i. Parking behind driver constitutes a stop requiring reasonable suspicion or probable cause as does turning on emergency lights. *Young v. State*, 803 So. 2d 880 (Fla. 5th DCA 2002); *Griffin v. State*, 800 So. 2d 345 (Fla. 4th DCA 2001); *Armatage v. State*, 954 So. 2d 669 (Fla. 1st DCA 2007); *Harrelson v. State*, 662 So. 2d 400 (Fla. 1st DCA 1995); *Brooks v. State*, 745 So. 2d 1113 (Fla. 1st DCA 1999); *Hrezo v. State*, 780 So. 2d 194 (Fla. 2nd DCA 2001); *Koppleman v. State*, 876 So. 2d 618 (Fla. 4th DCA 2004); *Siplin v. State*, 795 So. 2d 1010 (Fla. 2d DCA 2001)*; Wands v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly 305 (Fla. 7th Cir. Ct., Jan. 27, 2006). **But** have to establish that driver perceived the show of authority. *G.M. v. State*, 19 So.3d 973 (Fla. 2009).

j. Jurisdiction

1. An officer who makes a stop and arrest outside his jurisdiction must comply with the requirements of section 901.25, Florida Statutes (the fresh pursuit statute) in order to find that the arrest is lawful. *McClung v. Dep't of*

Highway Safety and Motor Vehicles, (Fla. 4th Cir. Ct., Oct. 27, 2003) *cert. den'd*. 878 So. 2d 480 (Fla. 1st DCA 2004); *Dep't of Highway Safety and Motor Vehicles v. Pipkin*, 927 So. 2d 901 (Fla. 3d DCA 2005); *Basich v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 9th Cir. Ct., Mar. 30, 2009); *Charlotin v. Dep't of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly Supp. 907 (Fla.9th Cir. Ct., May 25, 2005)(university police officer)

2. The power to arrest after fresh pursuit presupposes that the officers had legally sufficient grounds to detain or arrest before they left their jurisdiction. *State v. Phoenix*, 428 So.2d 262 (Fla. 4th DCA 1982)

3. Once arrest is made outside of jurisdiction, the officer shall immediately notify the officer in charge of the jurisdiction in which the arrest is made and they must take the person so arrested before a county court judge or other committing magistrate of the county in which the arrest was made.

4. Must establish at hearing that not in their jurisdiction. *Eichmann v. Dep't of Highway Safety and Motor Vehicles*, 16 Fla. L. Weekly Supp. 38 (Fla.18th Cir. Nov. 4, 2008)

5. Citizen's arrest. - *Edwards v. State*, 462 So. 2d 581 (Fla. 4th DCA 1985); *State v. Schuyler*, 390 So.2d 458, 460 (Fla. 3d DCA 1980); *Schachter v. State* 338 So.2d 269, 270 (Fla. 3d DCA 1976); *Phoenix v. State*, 455 So.2d 1024 (Fla.1984); *Randall v. Dep't of Highway Safety and Motor Vehicles*, 16 Fla. L. Weekly Supp. 614 (Fla. 9th Cir. Ct., April 1, 2009); *Smyth v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., Nov. 18, 2010). Must actually arrest. *Steiner v. State*, 690 So. 2d 706 (Fla. 4th DCA 1997). But be aware that there are also circuit court opinions upholding stops as "citizen's arrests."

k. Speeding – Denying subpoenas for speed documents- but see s. 316.1905 and 316.1906 and correlated rules. If stop based solely on speed device – record fails to establish competent substantial evidence from which hearing officer can find that officer's belief that driver speeding is correct. *Carter v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., Aug. 1, 2011) *cert. den'd*, 91 So. 3d 136 (Fla. 1st DCA 2012). Also argue violation of due process. Be aware of *Dep't of Highway Safety and Motor Vehicles v. Nelson*, 823 So. 2d 828 (Fla. 1st DCA 2002) but can distinguish because no discussion of due process and court noted other grounds for stop.

l. Ordering defendant out of car and asking questions requires Miranda warnings. *State v. Serrano*, 10 Fla. L. Weekly Supp. 57 (Fla. Palm Bch. Cty. Ct., Nov. 26, 2002).

m. The act of Mirandizing the Defendant and placing him in the back of the patrol vehicle to transport for field sobriety exercises constitutes an arrest. *State v. Perry*, Fla. Duval Cty. Ct., Nov. 30, 2001).

n. Tire not fully inflated as basis of stop. *Frey. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly Supp. 11 (Fla. 7th Cir. Ct., Nov. 21, 2002).

o. Roadblocks - Written guidelines necessary and they must be followed. *Hancock v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 918 (Fla. 4th Cir. Ct., July 30, 2012). Hearing Officer cannot provide - *Dep't of Highway Safety and Motor Vehicles v. Griffin*, 909 So. 2d 538 (Fla. 4th DCA 2005); *Aaron v. Dep't of Highway Safety and Motor Vehicles* 13 FLW Supp. 327 (Fla. 7th Cir. Ct., Jan. 5, 2004).

p. Blocked tag - *Harris v. State*, 11 So. 3d 462 (Fla. 2d DCA 2009).

q. Failure to Yield – *Delk v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 800c (Fla. 9th Cir. Ct., June 15, 2011).

r. Cracked windshield - *Hilton v. State,* 961 So. 2d 284 (Fla. 2007)

s. Failure to immediately turn on headlights - *See Payne v. State*, 654 So. 2d 1252 (Fla. 2d DCA 1995) and *State v. Lagree,* 595 So. 2d 1029 (Fla. 1st DCA 1992), wherein the district court found that when defendant pulled onto highway in front of a business and traveled ½ a city block before turning on her headlights, evidence insufficient to stop her absent proof of more.

t. Tag Light – how many and to whom does it apply (not dump trucks)

u. Blocking the Roadway – No such general prohibition

v. Community Caretaker – *Majors v. State,* 70 So. 3d 655 (Fla. 1st DCA 2012); *State v. Birchfield*, 19 Fla. L. Weekly Supp. 1093A (Fla. 20th Cir, Ct. Sept. 7, 2012).

2. Vehicle inoperable - *Dep't of Highway Safety and Motor Vehicles v. Sarmiento,* 989 So. 2d 692, (Fla. 4th DCA 2008); *Williams v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 7th Cir. Ct., April 13, 2009); *Brown v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 698a (Fla. 6th Cir. Ct., May 14, 2012).

3. Recantation issues.

a. In *Larmer v. Dep't of Highway Safety and Motor Vehicles,* 522 So. 2d 941 (Fla. 4th DCA 1988), the driver refused the breath test and asked to speak with an attorney. A telephone was provided to the Defendant and within minutes after the initial refusal, the Defendant changed his mind and recanted his initial refusal. The testing officer refused to allow the Defendant the opportunity to take the test. The appellate court ruled that the license suspension should be invalidated because the later recantation cured the earlier refusal. A four part test was developed to determine whether a recanting driver should be given another opportunity to take a breath test.

b. Compare *Larmer* with *Dep't of Highway Safety and Motor Vehicles v. Dean*, 662 So. 2d 371 (Fla. 5th DCA 1995), where a driver testified at a formal review hearing that he recanted his initial refusal. The license suspension was upheld on appeal. The difference between the *Dean* and the *Larmer* opinion is very significant and should be considered when preparing for any formal review hearing. In *Dean*, the breath testing officer was not subpoenaed by either party to attend the hearing, so the only evidence that the Defendant refused the breath test was the refusal affidavit signed by the testing officer. Of course, the affidavit was silent concerning whether the Defendant had recanted his refusal. The driver in *Dean* testified and agreed that he initially refused to take the breath test, but he also testified that he recanted his refusal. That testimony was unrebutted and unrefuted in the record. Apparently, the Department hearing officer chose to disbelieve this testimony and upheld the administrative suspension. On appeal, the driver argued that the hearing officer must accept unrefuted and unrebutted testimony, and that the Department could have subpoenaed the testing officer to the hearing to refute the recantation issue. The Department argued that the statutory and administrative scheme of upholding license suspensions based on sworn paperwork would be defeated if the Department had to subpoena in the testing officer in every refusal case in anticipation of a recantation issue being made by the driver. The Fifth District Court of Appeal reluctantly agreed with the Department and found that the hearing officer did not have to accept the

unrefuted and uncontradicted testimony of the driver. *See also Dep't of Highway Safety and Motor Vehicles* v. *Luttrell*, 983 So. 2d 1218 (Fla. 5th DCA 2008).

c. In *Kieser v. Dep't of Highway Safety and Motor Vehicles*, 5 Fla. L. Weekly Supp. 635b (Fla. 4th Cir. Ct., Mar. 23, 1998), *cert. den'd*, 98-1527 (Fla.1st DCA 1998), the driver was given several chances to blow into the machine but was manipulating the mouthpiece. Finally, after the third "manipulation", the driver was told that his actions were going to be considered a "refusal". At that time, the driver asked for another chance. The operator did not permit the driver to blow. The hearing officer took the license. On appeal, the Department argued that a driver who manipulates the machine cannot recant. The circuit court rejected this argument. The First DCA denied cert. *See also*; *Green v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 43c (Fla. 4th Cir. Ct., Aug. 18, 2005).

4. Accident report privilege

a. Applicability to administrative hearings

1. Under the new statute, the "crash report" shall be placed in the record. there is no reference to a driver's statements however, or other traditionally protected statements. The applicability of the protections to statements will have to be litigated. Since the "statements" previously contained in the pc affidavit were protected, it should follow that the "statements" in the accident report should be protected. *But see Juettner v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 538 (Fla. 6th Cir. Ct., Mar. 26, 2008); *Horne v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 442 (Fla. 13th Cir. Ct., Mar. 20, 2008); *Schmidt v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 439 (Fla. 12th Cir. Ct., Mar. 20, 2008); *Cram v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 304 (Fla. 6th Cir. Ct., Jan. 17, 2008); *Lambo v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 838 (Fla. 13th Cir. Ct., July 12, 2007). If not yet addressed in your circuit, it is worth still arguing.

b. Due to the change, it is not clear how the following cases will now be applied.

c. The First District Court of Appeal has addressed the issue of whether the accident report privilege applies to administrative driver's license hearings. In *White v. Consolidated Freightways et.al*, 766 So. 2d 1228 (Fla.1st DCA 2000), the District Court stated that the accident report privilege applies to administrative hearings. The First DCA had previously denied certiorari in *Jordan v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Oct. 15, 1998) *cert. den'd*, (Fla.1st DCA 1998). In that case the circuit court had overturned a suspension stating that the petitioner in that case could invoke the privilege as to all statements made by all individuals who have a duty to report accidents.

d. The Fifth District Court of Appeal addressed this issue in *Dep't of Highway Safety and Motor Vehicles v. Perry*, 702 So. 2d 294 (Fla. 5th DCA 1997). In *Nelson v. Dep't of Highway Safety and Motor Vehicles*, 757 So. 2d 1264 (Fla.3d DCA 2000), the Third District Court of Appeal determined that the Department could not consider any statements made at the scene for the purpose of completing the required accident report. *See also Miller v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct., Sept. 28, 2002).

e. Persons privilege applies to.

1. The accident report privilege can be used to suppress any statement by any person involved in the accident which identifies the client as a driver. The accident report privilege applies to drivers, owners, and occupants of vehicles involved in automobile accident. *White v. Consolidated Freightways et al*, 766 So. 2d 1228, (Fla.1st DCA 2000)*; Hoctor v. Tucker*, 432 So. 2d 1352 (Fla. 5th DCA 1983); *Dinowitz v. Weinrub*, 493 So. 2d 29 (Fla. 4th DCA 1986); *Jones v. State*, (Fla. 4th Cir. Ct., Nov. 27, 2002). In other words, any statement made during an accident investigation is subject to the accident privilege and the privilege can be invoked as to any statement made by any person involved in the accident. *See also*; *Wiggen v. Bethel*, 192 So. 2d 796 (Fla. 3d DCA 1966), *quashed on other grounds*, 200 So. 2d 797 (Fla. 1967), *on mandate*, 201 So. 2d 911 (Fla. 3d DCA 1967).

f. Impact on proof of element of actual physical control. *Carroll v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct. August 28, 2000); *Chapman v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 268b (Fla. 4th Cir. Ct. December, 2000); *Jordan v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct. October 15, 1998) *cert. denied* (Fla. 1st DCA 1999); *Miller v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct. Sept. 25, 2002).

1. See *Edmonds v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 27 (Fla. 18th Cir. Ct, July, 31, 2000) wherein the court found that even though Edmonds was found behind the wheel with a head injury, since passenger's statement as to who was driving was covered by accident report privilege, there was insufficient evidence of who was driving since there was no evidence as to location of the keys.

g. If it is not clear in the sworn probable cause statement where the information contained in the statement came from in an accident case, the hearing officer cannot rely on that information to uphold the suspension. *Blizzard v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 266a (Fla. 4th Cir. Ct. February 1, 2001); *Cato v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 267a (Fla. 4th Cir. Ct., Feb. 22, 2001); *Fisher v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly Supp. 1a (Fla. 4th Cir. Ct., Oct. 1, 2002); *Kiesel v. Dep't of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 488a (Fla. 7th Cir. Ct., April 28, 2004).

5. Confusion doctrine - driver confused because told right to attorney so invokes right when requested to take breath test so requests lawyer and is written up as refusal- this applies if driver not told that right to counsel has nothing to do with decision to take breath test. *State v. Alves*, (Fla. Orange Cty. Ct., April 24, 1995); *State v. Fenning*, (Fla. St. John's Cty. Ct., Dec. 14, 1998); *Ringel v. Dept of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 678a (Fla. 18th Cir. Ct., July 30, 2002); *Fox v. Dept of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 276b (Fla. 9th Cir. Ct., Jan. 21, 2004); *Bosch v. Dept of Highway Safety and Motor Vehicles*, (Fla. 7th Cir. Ct., Aug. 6, 2003); *State v. Power*, 15 Fla. L. Weekly Supp. 730a (Fla. Palm Bch. Cty. Ct., May 15, 2008); *Kronen v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 6th Cir. Ct., Nov. 3, 2010); *Calvert v. Dep't of Revenue, Motor Vehicle Division*, 184 Colo. 214, 519 P. 2d 341 (Colo. 1974); *Rust v. Dep't of Motor Vehicles, Division of Driver's*

Licenses, 267 Cal. App. 2d 545, 73 Cal. Rptr. 366 (Cal. App. 4th Dist. 1969); *Hawaii v. Severino* 56 Haw. 378, 537 P. 2d 1187 (Hawaii 1975); *Dep't of Transportation, Bureau of Public Safety v. Connell,* 555 A. 2d 873 (Pa. 1989); *Minnesota v. Bechley* 192 N.W. 2d 441 (Minn. 1971). *But see Bishop v. Dept of Highway Safety and Motor Vehicles*, 3 Fla. L. Weekly Supp. 14a (Fla. 10th Cir. Ct., Feb. 10, 1992). *See Moore v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 932a (Fla. 9th Cir. Ct., Aug. 3, 2006), for a lengthy discussion of "confusion doctrine."

6. S.316.645 – Authority to arrest if conduct crash investigation. *Morgan v. Dep't of Highway Safety and Motor Vehicles*, FLWSUPP2002MORG (Fla. 9th Cir. Ct., Oct. 3, 2012). But arrest must be made by an officer that conducts investigation.

F. DUE PROCESS IN DMV HEARINGS

1. The Florida Supreme Court reiterated that due process applies to administrative driver's license suspensions in *Dep't of Highway Safety and Motor Vehicles v. Hernandez*, 74 So. 3d 1070 (Fla. 2011).

2. An agency violates a person's due process rights when they ignore the very rules that they have promulgated. *Armesto v. Weidner,* 615 So. 2d 707 (Fla. 3d DCA 1993). Any violation of due process entitles driver to relief.

3. Right to issuance for subpoena for witnesses and officers identified in documents per statute. *Lee v. Dep't of Highway Safety and Motor Vehicles*, 4 So. 3d 754 (Fla. 1st DCA 2009); *Fuller v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 7th Cir. Ct., Dec. 17, 2012).

4. Impartial hearings

a. There should be no ex parte discussions between hearing officer and witnesses. Under 322.26151, "the Department" is required to review the record for missing or incomplete documents. DMV currently interprets that as the BAR should review the documents. To review the files, the DMV has created a "schedule A" which lists the necessary documents with a check off area, and contains the name of the person who called for a missing document as well as who they called. This raises the question of a lack of impartiality or at least the appearance of a lack of impartiality. In *Nix v. Jones, et al*, (Fla. 4th Cir. Ct., June 11, 2009), the matter was brought before that court by a motion for declaratory judgment and request for injunctive relief. The hearing officer had denied the driver's request for a subpoena for the person at the BAR who had signed the "Schedule A." The driver had sought to have the hearing officer enjoined from conducting the hearing until the court could rule as to whether the driver was entitled to the subpoena requested. Although the court found that the driver was not entitled to injunctive relief due to the availability of certiorari review, the court found that evidence that the BAR requested additional documents to be placed into the record "is extremely relevant to the issues in that administrative proceeding and may very well establish an overall violation of Plaintiff's right to due process by demonstrating that the Hearing Officer has acted in a manner that is patently biased against the Plaintiff's position." The court also found, "*Lee* cannot be any clearer in its holding that a Hearing Officer can issue subpoenas for witnesses identified not only in the documents submitted by the law enforcement agency, but also for any witness found in any documentary evidence submitted prior to the hearing. *Lee v. DHSMV,* 4 So. 3d at 758. Plaintiff submitted the Schedule A and Ms. Hite is a witness identified in that document. Under *Lee,* the Hearing Officer violates the driver's rights to procedural due process if he or she refuses to issue a subpoena under such circumstances." When you find that additional documents have been added, ask for a copy of the schedule A, place it into the record, and ask for a subpoena for the

person who requested the document so that you can establish a due process violation. Be aware though that they may now be contacting law enforcement without using the schedule A to avoid us getting a copy, and have started refusing to allow us to put it into the record. Objects as a violation of driver's due process and statutory right to present evidence. See. S. 322.2615(1)(b)5. *But see Reed v. Dep't of Highway Safety and Motor Vehicles*, (Fla 4th Cir, Ct., Sept. 22, 2010).

b. The Rules address recusal of the hearing officer if the driver fears a denial of an impartial hearing thereby recognizing the requirement that a hearing officer be impartial.

c. *Ducre v. State*, 768 So. 2d 1159, (Fla. 2d DCA 2000), states that whether appearing before a hearing officer or the court, a litigant should have confidence in the impartiality of the fact-finder. Although this is not a DMV case, the finding is applicable to DMV hearings.

1. *Burleson v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Nov. 21, 2001)("The hearing officer's misguided belief that a photograph of the defendant at the time of his refusal is not relevant in a hearing to review, among other things, whether the arresting officer had probable cause to believe the petitioner was driving a vehicle while under the influence of alcoholic beverages, is at best difficult to understand. At worst, it could represent a mind-boggling refusal to afford due process.")

2. *Gonzalez v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Nov. 30, 2001)("...a failure to preserve an appearance of impartiality seems to be a problem with the respondent's hearing officers. Numerous orders from this circuit have had no apparent effect on the conduct of hearing officers in this regard.")

d. The Department may maintain copies of documents which are used on a repetitive basis at formal review hearings. *Dep't of Highway Safety and Motor Vehicles v. Meeham*, 787 So. 2d 221 (Fla. 2d DCA 2001); *Cordell v. Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 237a (Fla. 20th Cir. Ct., Jan. 4, 2008). Hearing officer cannot obtain documents to place in the record even if it just from a filing cabinet. *Dep't of Highway Safety and Motor Vehicles v. Griffin*, 909 So. 2d 538 (Fla. 4th DCA 2005); *Aaron v. Dep't of Highway Safety and Motor Vehicles* 13 FLW Supp. 327 (Fla. 7th Cir. Ct., Jan. 5, 2004); *Schwartz v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 409 (Fla. 7th Cir.Ct., Nov. 4, 2009)*cert den'd* (5th DCA Oct. 19, 2010)

e. Hearing officer must leave an impression of impartiality and refrain from extensive questioning of witnesses. - Statute permits hearing officer to ask questions. This does not override need to be impartial.

3. *Stewart v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 1061(Fla. 4th Cir. Ct., Sept. 5, 2012)(driver deprived of due process when hearing officer kept interrupting attorney and failed to maintain an appearance of neutrality.); *Thompson v. Dep't of Highway Safety and Motor Vehicles*, 19 Fla. L. Weekly Supp. 917(Fla. 4th Cir. Ct., July 30, 2012)

2. *Costanza v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Oct. 6, 2000)(" ...the hearing officer below, by interposing objections and

by severely limiting the scope of direct examination of witnesses, did not leave an "impression of impartiality[.]" *Love v. State*, 569 So. 2d 807, 810 (Fla. 1st DCA 1990)("[a] judge must not only be impartial, he must leave the impression of impartiality upon all those who attend court"). Courts have also recognized that "[e]xtensive participation of the trial judge, such as excessive questioning of witnesses, may amount to usurping the functions of counsel and be an abuse of the discretion and latitude of the courts in such respects, with resultant injury to the rights of a party...."Burnby & Stimpson v. Peninsula Utilities Corp., 169 So. 2d 499, 501(Fla. 3d DCA 1964). This Court finds that the hearing officer abused her discretion when she participated to the point of interposing objections to relevancy and instructing witnesses not to answer questions." *But see Cadwell v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 709 (Fla. 16th Cir. Ct., June, 2007).

3. *Dep't of Highway Safety and Motor Vehicles v. Pitts*, 815 So. 2d 738 (Fla. 1st DCA 2002) *reh. den'd* (Fla. 1st DCA May 31, 2002) - the district court recognized that although the hearing officer may question witnesses, she must remain impartial and detached and she departs from the position of neutrality when she elicits evidence that the Department never submitted. *But see Dep't of Highway Safety and Motor Vehicles* v. *Boesch*, 979 So. 2d 1024 (Fla. 3d DCA 2008)("The hearing officer is not a potted plant.")

4. In *George v. Dep't of Highway Safety and Motor Vehicles* (Fla. 4th Cir. Ct. Aug. 29, 2001) *cert den'd* (Fla. 1st DCA 2002)("While the hearing officer is authorized to ask questions of a witness, in this instance the hearing officer took over the Department's case when it appeared that there were some glaring discrepancies.....Most troublesome was her leading question found at page 38 in the transcript where she introduced into the hearing for the first time the fact that the appellant was informed of the possibility of suspension for refusal to submit to a second sample.....The hearing officer also led the witness into changing a previous answer.....By her conduct, the hearing officer departed from the appearance of neutrality and became a participant in the hearing")

5. *Blackburn v. Dep't of Highway Safety and Motor Vehicles* , (Fla. 4th Cir. Ct., Oct. 23, 2001)("the authorization to question a witness does not relieve the hearing officer of her duty to remain neutral and detached, nor of her duty to conduct the hearing in a way that accords due process.")

6. *Friesland v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Dec. 17, 2001)(circuit court specifically rejected the Department's arguments that the hearing officer does not sit in a typical judicial role, but sits as a participant in the proceedings and that she substitutes for the lack of counsel on behalf of the Department.)

7. *O'Brien v. Department of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., July 20, 2006) - "Petitioner argues that the hearing officer departed from her neutral role and became an advocate for Respondent by eliciting evidence not already in the record, rather than merely clarifying previously-introduced evidence, which denied him due process. This Court agrees."

f. See also *Dep't of Highway Safety and Motor Vehicles v. Dean*, 662 So.2d 371 (Fla. 5th DCA 1995) wherein the court raised concern regarding the impartiality of the statutory set up.

g. It is a violation of due process when the hearing officer places additional documents into the record over driver's objection. *Netterville v. Dep't of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 512A (Fla. 8th Cir. Ct., March 24, 2011).

h. *Wiggins v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., May 15, 2001) the court found that notwithstanding the fact that there was competent and substantial evidence in the record to support the hearing officer's findings, the actions of the hearing officer rose to the level of a violation of the petitioner's due process rights thereby requiring a granting of the writ for certiorari. *See also Bell v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., May 15, 2006)

i. Refusal to consider the driver's relevant evidence also a violation of due process *Chapman v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 268a (Fla 4th Cir. Ct., Feb. 7, 2001) *cert. den'd* (Fla. 1st DCA 2001). In that case, the driver submitted a blood test result which disputed the breath result. The hearing officer upheld the suspension disregarding the blood result.

i. Refusal to continue hearing with a permit to allow driver an opportunity to subpoena and question additional witnesses identified at the formal review hearing violates a driver's right to cross examine witnesses. *Schirmer v. Dep't of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 76a (Fla. 4th Cir. Ct., Dec. 18, 2001).

j. Failure of witness to answer questions and failure of hearing officer to direct witness to answer questions is a violation of due process. *Lotocki v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., April 19, 2010); *Stott v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Jan. 6, 1998); *Perez v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 1085(Fla. 13th Cir. Ct., July 21, 2010).

k. *Crespi v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 9th Cir. Ct., Feb. 2, 2010) – violation of due process when the hearing officer upheld the suspension after the arresting officer failed to comply with subpoena duces tecum for field sobriety testing manuals.

5. Recusal

a. Rule 15A-6.008 sets out the procedures for recusal

b. hearing officer must give driver opportunity to file motion for recusal. *Goodknecht v. State*, 3 Fla. L. Weekly Supp. 656, (Fla. 7th Cir. Ct., Feb. 26, 1996).

6. Department's compliance with the rules

a. Rule 15A-6.012 sets out procedures for issuance of subpoenas

1. The Department should not alter the requests for subpoena duces tecum. When hearing officer improperly limits request for documents regarding the breath testing equipment, due process is violated. See *Kohl v. Dep't of Motor Vehicles and Highway Safety*, 8 Fla. L. Weekly Supp. 747c (Fla. 4th Cir. Ct. Sept. 13, 2001); *Hands v. Dep't of Motor Vehicles and Highway Safety*, 3 Fla. L. Weekly Supp. 482a (Fla. 9th Cir. Ct., Aug. 8, 1995); *Kaur-Mullinax v. Dep't of Highway Safety and Motor Vehicles*, 1 Fla. L. Weekly C503 (Fla. 9th Cir. Ct.,

Jan. 25, 1993); *Caswell v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., May 9, 2003); *Ponton v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Sept. 20, 2002).

b. Law enforcement officers must comply with rules regarding service of subpoenas. *Estraviz v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., July 15, 1997) *cert. den'd.* (Fla. 1st DCA 1997); *Reynolds v. Dep't of Highway Safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 426 (Fla. 15th Cir. Ct., March 9, 2010).

c. Failure to afford driver rights enumerated in the rules is violation of due process. *See Panken v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Sept. 18, 2000); *Compton v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Sept. 18, 2000); *Corcoran v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Dec. 7, 2000) and *Colston v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., April 17, 2001); *Costanza v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Oct. 6, 2000)*; Wiggins v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., May 15, 2001); *Verner v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct. Feb. 6, 2003) *cert. den'd* 926 So. 2d 463 (Fla. 1st DCA 2006).

PETITIONS FOR WRIT OF CERTIORARI

I. **PROCEDURES**

A. Must be filed within 30 days of "rendition" of order

1. Go by the date on the order.
2. No such thing as a belated petition – if miss deadline, no jurisdiction to consider
3. File either in circuit court for the county where the hearing was held or where client resides. – s. 322.2615(13).)
4. Fla. R. Crim. P. 9.100 sets out the specific procedures including requirements of briefs.
5. Send proposed Order to Show Cause
6. Department not required to respond until order to show cause has been issued.

a. Check order to show cause to confirm whether court included different time frames from the times designated in the rules.

B. The Petition

1. Font and spacing requirements set out in the rules
2. Include an appendix with any documents necessary for the full review of the decision of the hearing officer.

a. copies of cases and/or rules
b. can only include evidence that was part of hearing
c. transcript from hearing

3. Begin at the beginning – courts generally have no clue about formal review hearings

4. Cite to the record
5. Be mindful of the standard of review
6. Must serve Department of Financial Responsibility at the same time as file petition if seeking attorney's fees and costs from the Department.

C. The Reply
1. ALWAYS do a reply. There is no substitute for getting the last word.
2. Note where Department did not respond to argument or cases
3. Address their arguments and cases
4. You cannot raise new issues in Reply. *Dep't of Highway Safety & Motor Vehicles v. Dellacava*, 100 So. 3d 234, 236 (Fla. 5th DCA 2012).

a. Department will often try to throw in a different standard of review. Be sure to correct if they do so.
b. canned responses

4. Note whether your assigned judge has prior opinions on the subject and address those whether good or bad. (You usually will not know at time of initial filing who the judge is.)
5. Request for Oral Argument must be filed at same time as reply

a. ALWAYS ask for Oral Argument
b. Bring copies of significant cases you have cited in your briefs.
c. LISTEN to the judge's questions/comments and address them.

D. The Rehearing
1. Must be filed within fifteen (15) days of the order being rendered (filed with the clerk of court).
2. Delays time for filing petition to the DCA if timely filed

II. **NEW GROUNDS FOR APPEAL**

A. Release of witness before opportunity to fully cross examine the witness. *Kenney v. Dep't of Highway Safety and Motor Vehicles* 18 Fla. L. Weekly Supp. 802a (Fla. 4th Cir. Ct., May 24, 2011).
B. Appearances by telephone – *But see Dep't of Highway Safety and Motor Vehicles v. Edenfield*, 58 So. 3d 904 (Fla. 1st DCA 2011) – Court denied petition based on standard of review, but wrote lengthy opinion about why it was okay for witness to phone it in.
C. Accident report privilege - although statute now requires accident report, does not say privilege no longer applies - pc affidavit always required, but privileged information was to be stricken so apply same reasoning to accident report.
D. Denial of permits.
E. Venue.

III. **ATTORNEY'S FEES AND COSTS**

A. The Department consistently and continuously forces drivers to appeal the decisions of

the hearing officers notwithstanding blatant violations of due process and blatant violations of clear legal precedent. In any case where this occurs, a motion for attorney's fees and cost should be filed.

B. Court must make specific findings regarding the fees and costs - *See Dep't of Highway Safety and Motor Vehicles v Trauth*, 971 So. 2d 906 (Fla. 3d DCA 2007); *Trauth v.Dep't of Highway Safety and Motor Vehicles*, 15 Fla. L. Weekly Supp. 871a (Fla. 11th Cir. Ct., July 3, 2008); *Whitehead v. Dep't of Highway Safety and Motor Vehicles*, (Fla.11th Cir. Ct., Feb. 28, 2008).

C. Fl. R. App. P. 9.400 - attorney's fees and costs.

1. Generally, motion for attorney's fees must be filed no later than the time for service of the reply brief (but see section on 57.105 below).

2. Costs may be taxed in favor of the prevailing party and may be requested by motion served within thirty (30) days of the mandate.

3. Attorney's fees may be taxed for a pleading or brief which is frivolous or filed in bad faith. - Fl. R. App. 9.400.

a. See *Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482 (Fla. 3d DCA 2000) for a definition of "frivolous".

4. The appellate court has broad authority to impose sanction under this rule. *Morales v. Rosenberg*, 879 So. 2d 1237 (Fla. 3d DCA 2004).

5. This rule does not provide basis for requesting fees, but only the procedure for requesting. *Dep't of Highway Safety and Motor Vehicles v Trauth*, 971 So. 2d 906 (Fla. 3d DCA 2007).

D. Section 57.105 Florida Statutes - attorney's fees only.

1. This section provides for the imposition of a reasonable fee to be paid to prevailing party in equal parts by losing party and their attorney unless attorney acted in good faith based upon material representations of their client where a claim or defense was not supported by the material facts or would not be supported by existing case law.

2. This section may be invoked either by motion or upon the court's initiative.

3. A motion seeking sanctions under this section must be served on the opposing party but cannot be filed or presented to the court unless the opposing party fails to take action within 21 days to correct their actions.

4 Pursuant to section 284.30, in order to collect attorney's fees from the Department, a copy of the pleading claiming the right to such fees must be served on the Department of Financial Services who is then entitled to participate in the defense of the suit. Prepare and serve a copy of motion for attorney's fee at the time the copy of the initial petition is served.

5. This section applies to governmental entities. *Northern Coats v. Metropolitan Dade County*, 588 So. 2d 1016 (Fla. 3d DCA 1991); *King v. Florida Parole Com'n*, 898 So. 2d 1100 (Fla. 1st DCA 2005). The Department repeatedly argues that section 57. 105 does not provide a basis for relief. The Department has, however, filed such a motion claiming entitlement to fees under section 57.105. See *Mikell v. Dep't of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 683b (Fla. 2d Cir. Ct., May 24, 2004).

6. Be aware that this section was significantly changed in 1999. The old interpretations of this statute therefore are no longer valid. *Forum v. Boca Burger, Inc.*, 912 So. 2d 561 (Fla. 2005).

E. The court has the inherent authority to impose attorney's fees for bad faith or inequitable conduct. *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) and *Bitterman v. Bitterman*, 714 So. 2d 356 (Fla. 1998).

1. blatant failure to follow the law - *See Costarell v. Florida Unemployment Appeals Commission* 916 So.2d 778 (Fla. 2005) for good language. *see also DeJong v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Oct. 29, 2008).

2. Court must make specific findings of bad faith or inequitable conduct. *Dep't of Highway Safety and Motor Vehicles v. Trauth*, 41 So. 3d 916 (Fla. 3d DCA 2010).

F. Fees may be awarded if the Department or its counsel knew or should have known that the defense raised was not supported by material facts or not supported by existing case law. *Gahn v. Holiday Property Bond, Ltd.*, 826 So. 2d 423 (Fla. 2d DCA 2002). Attorney's fees may be awarded where a party has persisted in trying to uphold a patently erroneous decision. *Forum v. Boca Burger, Inc.*, 912 So. 2d 561 (Fla. 2005); *Freedom Commerce Centre Venture v. Ranson*, 823 So. 2d 817 (Fla.1st DCA 2002).

G. Attorney's fees and/or costs have been successfully sought. *Ciresi v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 7th Cir. Ct., Aug. 1, 2011); *Lovely v. Dep't of Highway Safety and Motor Vehicles*, 12 Fla. L. Weekly 185 (Fla. 4th Cir. Ct., Nov. 1, 2004) *cert. den'd.* 933 So. 2d 527 (Fla.1st DCA 2006); *Bell v. Dep't of Highway Safety and Motor Vehicles*, 13 Fla. L. Weekly Supp. 756a (Fla. 4th Cir. Ct., May 15, 2006); *Walker v. Dep't of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly 880 (Fla. 4th Cir. Ct., July 15, 2004); *Caswell v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly 947 (Fla. 4th Cir. Ct., Oct. 23, 2003); *Brown v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly 849 (Fla. 4th Cir. Ct., Sept. 15, 2003); *Bogard v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly 315 (Fla. 7th Cir. Ct., April 1, 2003); *Whitehead v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 11th Cir. Ct., Feb. 28, 2008).

IV. **REMANDS**

A. In considering a petition for writ of certiorari, the court has only two (2) options. The Court can either deny the petition, or grant the petition and quash the order at which the petition is directed. *Tedder v. Florida Parole Commission*, 842 So. 2d 1022, 1024 (Fla. 1st DCA 2003); *Broward County v. G.B.V. Int'l. Ltd.*, 787 So. 2d 838 (Fla. 2001).

1. In *National Advertising Company v. Broward County*, 491 So. 2d 1262 (Fla. 4th DCA 1986), the court held "a court's certiorari review power does not extend to directing that any particular action be taken, but is limited to denying the writ of certiorari or quashing the order reviewed."

B. Remand is not appropriate for due process violations. *See* Order Denying Remand in *Corcoran v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 269a (Fla. 4th Cir. Ct., Dec. 7, 2000); *Stott v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct.,

Jan. 6, 1998); *Williamson v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Jan. 15, 1999); *Verner v. Dep't of Highway Safety and Motor Vehicles*, 10 Fla. L. Weekly Supp. 150a (Fla. 4th Cir. Ct. Feb. 6, 2003) *cert. den'd* 926 So. 2d 463 (Fla. 1st DCA 2006); *Gonzalez-Vega v. Dep't of Highway safety and Motor Vehicles*, 17 Fla. L. Weekly Supp. 1072 (Fla. 9th Cir. Ct., Aug. 6, 2010), *Gonzalez v. Dep't of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 75a (Fla. 4th Cir. Ct., Nov. 30, 2001). In *Gonzalez*, the court refused to remand, stating,

> Normally in these cases the Court has remanded for further proceedings. However, a failure to preserve an appearance of impartiality seems to be a problem with the respondent's hearing officers. Numerous orders from this circuit have had no apparent effect on the conduct of hearing officers in this regard. Therefore, this Court concludes that remand would serve no useful purpose and that the only appropriate remedy is to quash the Final Order of License Suspension....

See also; Bell v. Dep't of Highway Safety and Motor Vehicles, 13 Fla. L. Weekly Supp. 756a (Fla. 4th Cir. Ct., May 15, 2006); *Williams v. Dep't of Highway Safety and Motor Vehicles*, 11 Fla. L. Weekly Supp. 487a (Fla. 4th Cir. Ct., April 13, 2004); *But see Lillyman v. Dep't of Highway Safety and Motor Vehicles*, 645 So. 2d 113 (Fla. 5th DCA 1994).

C. *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 37 Fla. L. Weekly D596 (Fla. 2d DCA 2012), "Although we are quashing the circuit court's order, we observe as we did in our prior order that the Department suspended Mr. McLaughlin's driver's license for a period of one year on January 7, 2007. Thus the suspension period expired while this matter was on review. Accordingly, other than quashing the administrative order, no further proceedings are necessary on remand because the issue of the validity of the suspension of Mr. McLaughlin's driver's license is moot." *See also Dobrin v. Dep't of Highway Safety and Motor Vehicles*, 874 So. 2d 1171 (Fla. 2004) *reh. den'd.* (Fla. May 27, 2004), ("we direct the reinstatement of the circuit court's order quashing Dobrin's license suspension."); *Dep't of Highway Safety and Motor Vehicles v. Pitts*, 815 So. 2d 738 (Fla. 1st DCA 2002)(First District Court of Appeal found that when the circuit court granted the petition for writ of certiorari, quashing the final order and reinstating the petitioner's driving privilege, the circuit court applied the correct law.)*; Dep't of Highway Safety and Motor Vehicles v. Stevens*, 820 So. 2d 322 (Fla. 5th DCA 2001)(the district court of appeal upheld the order of the circuit court quashing the suspension of the petitioner's driver's license.); *Fuller v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 7th Cir. Ct., (Dec. 17, 2012).

D. *Ross v. State*, 901 So.2d 252, 254 (Fla. 4th DCA 2005)(Finding it a denial of due process not to apply well settled law); *Costarell v. Florida Unemployment Appeals Commission* 916 So.2d 778 (Fla. 2005)- ("...we caution the Commission and its counsel that it too is bound by the rule of law, and **we express dismay that an official agency of the State of Florida and its counsel would show so little regard for the controlling holdings of an appellate court of the State of Florida**...As agency of this state, such as the Commission, must follow the interpretations of statutes as interpreted by the courts of the state.").

E. If remand is ordered, entitled to full hearing. *Thomas v. Dep't of Highway Safety and Motor Vehicles*, (Fla. 4th Cir. Ct., Nov. 1, 2004); *Lillyman v. Dep't of Highway Safety and Motor Vehicles*, 645 So. 2d 113 (Fla. 5th DCA 1994) .

F. Endless loop.

G. Department should not be given a second chance. *Jannotti v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 39 (Fla. 18th Cir. Ct., June 26, 2006). So. 2d 391 (Fla. 1974).

H. But under *Dep't of Highway Safety and Motor Vehicles v. Icaza*, 37 So. 3d 309 (Fla. 5th DCA 2010), Department entitled to remand when there has been a change in the law and the Department wants a chance to implement the change (Such as the *Pelham* decision.)

SAMPLE LETTERS AND DOCUMENTS

DAVID M. ROBBINS
ATTORNEY AND COUNSELOR AT LAW
233 E Bay Street, Suite 1125
Jacksonville, FL 32202
www.flduidefense.com

Associates:
Susan Z. Cohen, Esq
Frank H. Gaulden, Esq
Neil D. Gornto, Esq.
Cheyenne L. Palmer, Esq
Tara A. Scudder, Esq

Telephone (904) 354-5645
Facsimile (904) 354-7427
eandr@flduidefense.com

«current_date_long»

VIA CERTIFIED MAIL

Supervisor or Designee
Bureau of Administrative Reviews
7439 Wilson Boulevard
Jacksonville, Florida 32210

Re: «Driver_full_name»
D.L. No.: «Driver_drivers_license»
Citation No.: «accident_venue»
Date of Arrest: «accident_date_short»

Enclosed please find an Application for Formal Review which I have prepared on behalf of my client along with payment in the amount of twenty-five dollars ($25.00) for the application fee.

This letter will also serve as a request for a copy of any and all documents, records, reports, etc. that will be admitted into the above client's record at the formal review hearing.

Please inform my office immediately as to any costs incurred with this request so that payment can be forwarded.

Thanking you in advance for your cooperation and attention regarding this matter.

Respectfully submitted,
EPSTEIN & ROBBINS

David M. Robbins

DMR/jmb
enclosures

DAVID M. ROBBINS
ATTORNEY AND COUNSELOR AT LAW
233 E Bay Street, Suite 1125
Jacksonville, FL 32202
www.flduidefense.com

Associates:
Susan Z. Cohen, Esq
Frank H. Gaulden, Esq
Neil D. Gornto, Esq.
Cheyenne L. Palmer, Esq
Tara A. Scudder, Esq

Telephone (904) 354-5645
Facsimile (904) 354-7427
eandr@flduidefense.com

July 18, 2011

Supervisor or Designee
Bureau of Administrative Reviews
7439 Wilson Boulevard
Jacksonville, Florida 32210

Re:
Date of Hearing: 7/26/2011

Dear Sir or Madam:

This letter is to confirm that a copy of the subpoenas in the above referenced case were furnished to the applicable State Attorneys Office on this date.

Thanking you for your time and attention, I am,

Sincerely,
EPSTEIN & ROBBINS

Jessica M. Blanton
Legal Assistant

/jmb

STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES
DIVISION OF DRIVER LICENSES
BUREAU OF ADMINISTRATIVE REVIEWS
7439 Wilson Blvd., Jacksonville, Florida 32210-3597

DRIVER'S PREHEARING STATEMENT

TO BE RETURNED TO THE ABOVE ADDRESS WITHIN TEN (10) DAYS OF THIS DATE:

NAME: **DL NUMBER**:

CITATION NO.:
HEARING DATE: **TIME**:
LOCATION:

1. Telephone Number where you can be reached 8 a.m. - 5 p.m., Monday thru Friday:

2. Will you be represented by legal counsel? Yes

3. If yes, give attorney's name, address and telephone number.

NOTE: *Please be advised* ***number #4*** *below must be completed or it will be returned, which may result in denial of request for subpoena (See Rule 15A-6.011(2) F.A.C.)* Pursuant to 15A-6.012(1), subpoenas shall be limited to officers and witnesses identified in documents submitted pursuant to section 322.2615(2), Florida Statutes (effective 10/1/06).

4. Attach subpoena(s) for DHSMV seal and signature (please enclose stamped self addressed envelope) and list below the names and addresses of all witnesses you are asking to appear at the hearing (attach additional page if necessary):

See Exhibit "A"

5. Estimated time necessary to present your case not to exceed one hour: 2 hours.

I certify that a copy of this Prehearing Statement has been mailed or delivered to the Department on , at the address listed above.

YOUR NAME (print or type)

_____
SIGNATURE

HSMV 78061 (Revised 10/06)

EXHIBIT "A"

NAME & ADDRESS	DOCUMENT IDENTIFYING WITNESS	DO YOU REQUEST A SUBPOENA YES OR NO?
**Officer B. R. Housend, #19203 Jacksonville Sheriff's Office	Probable Cause Affidavit	Yes- Duces Tecum
**Officer D. Boston, #65272 Duval County Jail	Breath Test Result Affidavit	Yes- Duces Tecum
**Officer C. E. Jarrell, #6004 Jacksonville Sheriff's Office	Probable Cause Affidavit	Yes – Duces Tecum
**Patrick Murphy Regional Alcohol Testing Inspector Florida Department of Law Enforcement	Breath Alcohol Test Affidavit & Inspection Documents	Yes- Duces Tecum
**Officer R. D. Thomason, #7326 Duval County Jail	Breath Alcohol Test Affidavit & Inspection Documents	Yes – Duces Tecum

*A subpoena has been enclosed for each of these witnesses pursuant to section 322.2615(6)(b), Florida Statutes.

**Proffer of details regarding subpoena duces tecum to be attached.

There was no probable cause to believe that the Defendant was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The Defendant did not have an unlawful blood alcohol level of .08 or above at the time of driving.

SUBPOENA DUCES TECUM

STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES
BUREAU OF ADMINISTRATIVE REVIEWS

Administrative Suspension Case No.: (CITATION NUMBER)

In Re:

Driver License No.:

TO: **Officer B. R. Housend, #19203**
Jacksonville Sheriff's Office
501 E. Bay Street
Jacksonville, FL 32202

YOU ARE COMMANDED to appear before a Hearing Officer, at the following date, time, and place:

DATE: **8/17/2011**
TIME: **10:00 A.M.**
PLACE: **7439 Wilson Boulevard, Jacksonville, Florida 32210**
TELEPHONE: **(904) 777-2132**

and bring with you the following; Personal appearance, testimony, and a copy of the video tape/DVD/CD recording of the stop and DUI investigation for the above-named individual Case No.: 2011-529795.

YOU ARE SUBPOENAED to testify in the above driver license suspension hearing.

Only the Hearing Officer may release you from this subpoena.

WITNESS my hand and seal of the Department this ____ day of _____, _____.

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

BY: _____

Inquiries regarding your obligations under this subpoena may be directed to:

SUPERVISOR OR DESIGNEE
BUREAU OF ADMINISTRATIVE REVIEWS
7439 Wilson Boulevard
Jacksonville, Florida 32210
(904) 777-2132

Subpoena requested by: David M. Robbins, Esquire

CC: Served to State Attorney Office by driver or counsel for driver.

NOTICE: ANY ALTERATIONS OFTHIS SUBPOENA WILL RENDER IT NULL AND VOID.

HSMV 72066 (REV 08/10)

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this proceeding please contact the Hearing Officer at the address and telephone number above at least 7 days before the scheduled hearing.

* *Pursuant to section 322.2615(6)(b), Florida Statutes and Florida Administrative Code, Rule 15A-6.012, the subpoena duces tecum for **Officer B. R. Housend, #19203** is necessary because he/she is the arresting officer and recorded his contact with the driver on a video tape/DVD/CD. Thus the subpoena should be a subpoena for testimony and duces tecum requesting him/her to bring with them a copy of the video tape/DVD/CD recording of the stop and DUI investigation regarding the above named individual.

SUBPOENA

STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES
BUREAU OF ADMINISTRATIVE REVIEWS

Administrative Suspension Case No.: **6190XEV**

In Re:

Driver License No.:

TO: **R. Thomason, #7326**
Duval County Jail
Jacksonville, Florida 32202

YOU ARE COMMANDED to appear before a Hearing Officer, at the following date, time, and place:

DATE: **8/17/2011**
TIME: **10:00 A.M.**
PLACE: **7439 Wilson Boulevard, Jacksonville, Florida 32210**
TELEPHONE: **(904) 777-2132**

YOU ARE SUBPOENAED to testify in the above driver license suspension hearing.

Only the Hearing Officer may release you from this subpoena.

WITNESS my hand and seal of the Department this ____ day of _____, _____.

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

BY: _____

Inquiries regarding your obligations under this subpoena may be directed to:

SUPERVISOR OR DESIGNEE
BUREAU OF ADMINISTRATIVE REVIEWS
7439 Wilson Boulevard
Jacksonville, Florida 32210
(904) 777-2130

Subpoena requested by: David M. Robbins, Esquire

CC: Served to State Attorney Office by driver or counsel for driver.

NOTICE: ANY ALTERATIONS OFTHIS SUBPOENA WILL RENDER IT NULL AND VOID.

HSMV 72066 (REV 08/10)

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this proceeding please contact the Hearing Officer at the address and telephone number above at least 7 days before the scheduled hearing.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 2011-CA-000733
DIVISION: CV-H
ADMINISTRATIVE SUSPENSION
CASE NO.: 1193XBN

,

Petitioner,

v.

OFFICER S. ALLEY, #5003, of the Jacksonville Sheriff's Office (witness in action of Petitioner vs. Department of Highway Safety and Motor Vehicles),

Respondents.

EMERGENCY PETITION FOR ENFORCEMENT OF SUBPOENA

Comes now the Petitioner, , by and through undersigned attorney, in this case, pursuant to Section 322.2615(6)(c), Florida Statutes and Rule 15A-6.012, Florida Administrative Code, and respectfully requests this Honorable Court to grant this Petition and relief sought herein and would state as grounds therefore and in support thereof the following:

1. Petitioner was arrested for driving under the influence on October 19, 2010. As a result of that arrest the Petitioner submitted to breath testing. The breath test results were over the legal limit resulting in an administrative suspension of his driver's license.

2. The Petitioner appropriately applied for an administrative formal review hearing to challenge the administrative suspension of his driver's license. The formal review hearing was scheduled for November 23, 2010.

3. Petitioner submitted the appropriate form subpoenas to be issued by the hearing officer and served by the Petitioner.

4. One such subpoena was for Officer S. Alley, #5003, of the Jacksonville Sheriff's Office, Duval County Pretrial Detention Facility.

5. The subpoena for Officer Alley was approved and issued by the hearing officer pursuant to s. 322.2612(6)(b) (See exhibit A).

6. This section states "the hearing officer shall be authorized to administer oaths, examine witnesses, and take testimony, receive relevant evidence, issue subpoenas for the officers and witnesses identified in documents in subsection (2)...". Section 322.2615(6)(b), *Fla. Stat. (2006).*

7. Officer Alley was listed as a participating witness in the "affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle...". Section 322.2615(2), *Fla. Stat. (2006).*

8. The Petitioner had Officer Alley served by a certified process server on November 10, 2010 (See exhibit B).

9. For the formal review hearing held November 23, 2010, Officer Alley submitted in writing to the hearing officer just cause as to why she could not attend and further requested a continuance. The hearing was continued to January 11, 2011, and Officer Alley's subpoena was to remain in effect (See exhibit C).

10. Officer Alley failed to appear for the hearing on January 11, 2011. The hearing officer did continue the hearing to February 22, 2011, at 10:00 a.m., for the subpoena to be enforced in circuit court[1].

Wherefore, the Petitioner requests this Honorable Court to order Officer S. Alley, #5003, to fully comply with the subpoena and to personally appear at the hearing scheduled for 10:00

[1] The hearing officer refused to issue a **written** Order Continuing Formal Review until such time that the petitioner could provide proof that the Emergency Petition for Enforcement of Subpoena has been filed with the clerk. A copy of such order will be provided to the Court upon receipt by the petitioner.

a.m., on February 22, 2011, at the Bureau of Administrative Reviews Office located at 7439 Wilson Boulevard, Jacksonville, Florida 32210. The Petitioner additionally requests this Honorable Court to make applicable the full force of contempt sanctions to any failure to abide by this Court's order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Officer S. Alley, #5003, Jacksonville Sheriff's Office, Duval County Pretrial Detention Facility, 500 E. Adams Street, Jacksonville, Florida 32202, by service of process; Hearing Officer Steven Wright, Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles, 7439 Wilson Boulevard, Jacksonville, Florida 32210, by facsimile and U. S. Mail; and General Counsel, for the Department of Highway Safety and Motor Vehicles, 2900 Apalachee Parkway, Room A432, Tallahassee, Florida 32399 by U. S. Mail, this the 21st day of January, 2011.

EPSTEIN & ROBBINS

BY_____
DAVID M. ROBBINS, ESQ.
FL Bar No.: 152433
CHEYENNE L. PALMER, ESQ.
FL Bar No.: 421340
233 E. Bay Street, Suite 1125
Jacksonville, Florida 32202
(904) 354-5645
Attorney for Petitioner

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 2011-CA-000733
DIVISION: CV-H
ADMINISTRATIVE SUSPENSION
CASE NO.: 1193XBN

,

Petitioner,

v.

OFFICER S. ALLEY, #5003, of the Jacksonville Sheriff's Office (witness in action of Petitioner vs. Department of Highway Safety and Motor Vehicles),

Respondent.

ORDER ON EMERGENCY PETITION FOR ENFORCEMENT OF SUBPOENA

This cause having come on to be heard upon the Petitioner's Emergency Petition for Enforcement of Subpoena, the Respondent having been lawfully served a subpoena to appear at a formal review hearing, and being otherwise fully advised in the premises, the Court finds as follows:

The Respondent shall appear at the formal review hearing scheduled for February 22, 2011, at 10:00 a.m. at the Bureau of Administrative Reviews Office, located at 7439 Wilson Boulevard, Jacksonville, Florida, and fully comply with the lawfully served subpoena.

DONE AND ORDERED, at Jacksonville, Duval County, Florida on this the _____ day of _____, 2011.

_____
CIRCUIT JUDGE

Copies to:

David M. Robbins, Esquire
Attorney for Petitioner
233 E. Bay Street, Suite 1125
Blackstone Building

Jacksonville, Florida 32202

Officer S. Alley, #5003
Jacksonville Sheriff's Office
Duval County Pretrial Detention Facility
500 E. Adams Street
Jacksonville, Florida 32202

Steven Wright, Hearing Officer
Bureau of Administrative Reviews
7439 Wilson Boulevard
Jacksonville, Florida 32210

General Counsel
Department of Highway Safety
and Motor Vehicles
2900 Apalachee Parkway, Room A432
Tallahassee, Florida 32399

Case No.: 2011-CA-000733

DAVID M. ROBBINS
ATTORNEY AND COUNSELOR AT LAW
233 E Bay Street, Suite 1125
Jacksonville, FL 32202
www.flduidefense.com

Associates:
Susan Z. Cohen, Esq
Frank H. Gaulden, Esq
Neil D. Gornto, Esq.
Cheyenne L. Palmer, Esq
Tara A. Scudder, Esq
.

Telephone (904) 354-5645
Facsimile (904) 354-7427
eandr@flduidefense.com

March 7, 2011

(JUDGE)

Re: **CLIENT vs. Officer D. Boston, #65272,** of the Jacksonville Sheriff's Office (witness in action of Petitioner vs. Department of Highway Safety and Motor Vehicles**)**
Case No.: 2011-CA-001960
Administrative Suspension Case No.: 1640XEY

Dear Judge :

Please find enclosed for your review and consideration, a courtesy copy of the Emergency Petition for Enforcement of Subpoena regarding the above referenced case. Please note that the Bureau of Administrative Reviews has scheduled the hearing in this case for **April 21, 2011.** Therefore, I would like to request that a hearing be scheduled prior to this date in order to enforce the subpoena.

However, should the Court feel that a hearing is not necessary to resolve this matter, I have also enclosed a proposed Order for your consideration.

Thank you for your consideration of this matter.

Respectfully submitted,
EPSTEIN & ROBBINS

David M. Robbins

DMR/jmb
Enclosures

cc: Officer D. Boston, Jacksonville Sheriff's Office,
Duval County Pre-Trial Detention Facility
General Counsel, Department of Highway Safety and Motor Vehicles
Steven Wright, Hearing Officer, Bureau of Administrative Reviews

DAVID M. ROBBINS
ATTORNEY AND COUNSELOR AT LAW
233 E Bay Street, Suite 1125
Jacksonville, FL 32202
www.flduidefense.com

Associates:
Susan Z. Cohen, Esq
Frank H. Gaulden, Esq
Neil D. Gornto, Esq.
Cheyenne L. Palmer, Esq
Tara A. Scudder, Esq

Telephone (904) 354-5645
Facsimile (904) 354-7427
eandr@flduidefense.com

July 19, 2011

VIA FACSIMILE (904) 777-2133

Ms. Candra Pellot, Hearing Officer
Bureau of Administrative Reviews
7439 Wilson Boulevard
Jacksonville, Florida 32210

Re: CLIENT
DL No.:
Date of Hearing:

Dear Ms. Pellot:

This letter shall serve as written notice that I intend to enforce through circuit court, the subpoena for Officer Downs regarding the above referenced hearing. Therefore, please notify me of the tentative continuance date prior to our deadline of July 25, 2011, so that the process can be initiated. I understand that the written order of continuance and accompanying permit cannot be issued until proof that the Petition has been filed has been provided to you.

Thank you for your consideration of this matter.

Respectfully submitted,
EPSTEIN & ROBBINS

David M. Robbins

DMR/jmb

ADMINISTRATIVE HEARING TIME KEEPER

CLIENT NAME: COUNTY:
DATE OF ARREST: BUREAU OFFICE:
DATE OF HEARING: HEARING LOCATION:
#1 #2 #3 #4

_____

_____ Sent Application for Formal Review

_____ Received Notice & Prehearing Statement / Order of Continuance

_____ Called for cost of paperwork / Cost Indicated on Notice of Hearing

_____ Requested check / _____ Rec'd check from

_____ Sent check for paperwork, By way of: Cert Mail Hand Delivery by _____

_____ Received Paperwork, By way of: U.S. Mail Hand Delivery by _____

_____ Sent Subpoenas for issuance, By way of: Cert Mail Hand Delivery by _____

_____ Received file back following review of attorneys for witness determination

_____ Requested witness checks / _____ Rec'd checks

_____ Received issued subpoenas, By way of: U.S. Mail Hand Delivery by _____

_____ Sent subpoenas for service by _____, and must be served not later than: _____

_____ Sent copies of subpoenas to SAO on, confirmation letter to BAR: _____

NAME	SERVED BY / DATE:	DATE MAILED TO BUREAU	CHECK INCLUDED

ADDITIONAL NOTES: _____

_____
_____
_____

DUI MANSLAUGHTER AND SERIOUS BODILY INJURY

By

Bobby Reiff, Esq., Miami

Life, Death & The DUI Manslaughter Case

bobby@duilawoffice.com

EXPERTS TO ASSIST YOU IN DOING THE RIGHT JOB

- TOXICOLOGIST
- INVESTIGATOR
- ACCIDENT RECONSTRUCTIONIST
- HUMAN FACTORS EXPERT

SHELLEY GOLDMAN v. STATE OF FLORIDA
COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT
57 So. 3d 274 (March 30, 2011)

INCOMPETENCE OF DUI TRIAL COUNSEL

CASE SUMMARY: Appellant sought review of the denial her motion for post-conviction relief.

OVERVIEW: Based on the cross-examination of the State's toxicologist at trial, it appeared that defense counsel was not prepared to challenge the blood alcohol content results. Counsel asked the toxicologist only one question that addressed that issue; whether improper storage and handling could have affected the test results, and the expert stated that it was possible. Counsel had no further questions for the expert and it appeared the jury did not hear any evidence that could have explained why a sealed tube could yield unreliable test results. The inmate showed a reasonable probability the outcome would have been different if the jury had received expert testimony about how temperature, contamination from the loss of vacuum in the tube, and other mishandling could have increased the amount of alcohol in the sample.

BE PREPARED *MENTALLY*
TO DO THE JOB!

- **MINIMUM *GUIDELINE* SENTENCE: 10 YEARS!**
- **MINIMUM *MANDATORY* SENTENCE OF 4 YEARS IN PRISON!**
- **LOSS OF DRIVER'S LICENSE FOR LIFE!**
- **DON'T THINK YOU CAN JUST WALTZ IN & PLEAD IT OUT!**

WHAT DO YOU DO FIRST?

- **COMMUNICATE WITH THE CLIENT!**
  - **–LEARN ABOUT THE CLIENT AND THEIR UNIQUE TRAITS.**
  - **–WHAT ARE THE ISSUES IN THE CASE?**
  - **–WHAT ARE THE *INITIAL* IMPORTANT ISSUES THAT YOU SEE & HOW DO YOU DEAL WITH THEM?**

MAKE SURE THEY KNOW NOT TO COMMUNICATE ABOUT THE CASE WITH *ANYONE OTHER THAN YOURSELF*!

- **SCRUB & ELIMINATE ALL SOCIAL MEDIA.**
  - **–FACEBOOK**
  - **–TWITTER**
  - **–TEXTING**

HOW THE VICTIM'S FAMILY & PROSECUTION PERCEIVE YOUR CLIENT'S BEHAVIOR IS CRUCIAL!

- **SET THE GROUND RULES:**
  - **NO CLUBBING!**
  - **NO DRINKING!**
  - **LIMITED DRIVING (OR NO DRIVING IF LICENSE SUSPENDED)!**
  - **TELL THEM: "YOU ARE BEING WATCHED; YOUR BEHAVIOR IS IMPORTANT!"**
  - **STAY UNDER THE RADAR!**

LEARN TO JUST SAY NO!

(From True Stories)

- **YOUR CLIENT WANTS TO SPEND THE SUMMER IN FRANCE?**
  - **JUST SAY NO!**
- **YOUR CLIENT WANTS TO BE RELEASED FROM HOUSE ARREST TO PERFORM "COMMUNITY SERVICE" AT THE ULTRA FESTIVAL?**
  - **JUST SAY NO!**

PERCEPTION IS REALITY!

- **HOW YOUR CLIENT IS *PERCEIVED* BY THE FAMILY OF THE VICTIM(S) WILL DRAMATICALLY EFFECT THEIR INTERACTION WITH THE PROSECUTION AND THEIR RECOMMENDATIONS TO THEM.**

PRESERVE, PRESERVE, PRESERVE!

- **IS THE SCENE OF THE ACCIDENT STILL FRESH? SEND AN ACCIDENT RECONSTRUCTIONIST OUT TO PHOTOGRAPH AND MEASURE.**
- **MEDICAL RECORDS & POSSIBLE BLOOD EVIDENCE FOR THE CLIENT AT THE HOSPITAL? OBTAIN, WITH A LETTER TO HOSPITAL REMINDING THEM *NOT TO DISCLOSE WITHOUT PERMISSION PURSUANT TO HIPPA.***

- **VEHICLES IMPOUNDED BY THE POLICE? SEND A LETTER TO THE INVESTIGATING OFFICER REQUESTING PRESERVATION (i.e., do not release the vehicle or remove the "Black Box" until your people inspect it).**
- **BLOOD FROM CLIENT BY POLICE? NOTIFY THE POLICE, THE LAB & THE PROSECUTOR, *IF ANY*, OF YOUR INTENT TO TEST IT YOURSELF SO THAT THEY SAVE SOME FOR YOU.**
- **OBTAIN STATEMENTS FROM WITNESSES, SWORN IN CASES WHERE YOU BELIEVE THEY MAY LATER CHANGE THEIR TESTIMONY.**

- **GO TO THE SCENE OF THE ACCIDENT!**
- **LOOK FOR SECURITY OR ROADWAY VIDEO CAMERAS.**
- **LOOK FOR INDICATORS OF DAMAGE OR ROADWAY DEFECTS OR IMPERFECTIONS.**
- **TAKE WITH YOU:**
  - **CAMERA/ VIDEO RECORDER**
  - **MEASURING WHEEL**
  - **LEVEL**

- **GOOGLE EARTH FOR AN OVERHEAD VIEW OF THE AREA OF THE ACCIDENT.**
- **REQUEST TRAFFIC ACCIDENT HISTORY RECORDS FROM THE JURISDICTION OF THE ACCIDENT TO DETERMINE IF THE AREA IS "ACCIDENT PRONE."**
- **REQUEST CERTIFIED DRIVER'S TRANCRIPTS FOR YOUR CLIENT & ANY OTHER DRIVERS INVOLVED.**

MAKE CONTACT WITH THE LEAD INVESTIGATOR

- **NOTIFY THE LEAD OFFICER, *IN WRITING*, OF THE FACT THAT NO CONTACT WITH CLIENT SHOULD BE HAD AT THIS TIME, AND THAT IF CHARGED, YOU'LL SURRENDER THEM AND/OR ACCEPT ANY TRAFFIC CITATION ON THEIR BEHALF.**

ADMINISTRATIVE DRIVER'S LICENSE SUSPENSION HEARINGS

- **DHSMV CAN SUMMARILY SUSPEND YOUR CLIENT'S DRIVER'S LICENSE FOR ONE YEAR FOR HAVING BEEN INVOLVED IN A FATAL CRASH.**
- **YOU ARE ENTITLED TO AN ADMINISTRATIVE HEARING TO CHALLENGE OR CONTEST THE SUSPENSION.**

CAUSATION & VEHICULAR HOMICIDE CASES

- **CAUSATION IS A VERY IMPORTANT ASPECT OF DUI MANSLAUGHTER/ VEHICULAR HOMICIDE CASES.**
- **WHY?:**
  - **(1) IT IS NEEDED TO *CHARGE YOUR CLIENT;***
  - **(2) *IT IS NEEDED TO CONVICT* YOUR CLIENT;**
  - **(3) IT IS NEEDED TO DRAW THEIR BLOOD FOR INVESTIGATIVE PURPOSES.**
- ***Magaw v. State,* 537 So.2d 564 (Fla. 1989) IS YOUR STARTING POINT.**

- **WHAT IS IT?**
  - ***Magaw:* THE PROSECUTION MUST EXHIBIT CONDUCT WHICH ESTBLISHES A "CASUAL CONNECTION" BETWEEN THE DEFENDANT'S CONDUCT & "THE RESULTING ACCI. WHICH CAUSED THE VICTIM'S DEATH."**
  - **THE PRIOR STANDARD, <u>STRICT LIABILITY</u>, MADE CAUSATION IRRELEVANT.**

  - **IN *Baker v. State,* 377 So.2d 17 (Fla. 1979), JUSTICE BOYD'S DISSENT CREATED THE SPARK FOR THE *Magaw* OPINION.**
  - **JUSTICE BOYD POINTED OUT THAT WITHOUT "CAUSATION", AN INTOXICATED PERSON COULD BE LAWFULLY SITTING AT A STOP LIGHT & STRUCK FROM BEHIND BY AN INTOXICATED DRIVER, WHO DIES, AND STILL BE FOUND GUILTY, A RIDICULOUS RESULT.**

- **BUT "CAUSATION" DOES NOT MEAN THAT THE DEFENDANT WAS THE "SOLE CAUSE OF THE ACCIDENT" RATHER, THAT THE DEFENDANT'S "OPERATION OF THE VEHICLE SHOULD HAVE CAUSED THE ACCIDENT."**
  - **IF YOU JUST THOUGHT, "WHAT DOES *THAT MEAN?," THEN YOU ARE LISTENING.***
  - **BECAUSE WHAT IS CAUSATION, AND HOW IT IS ULTIMATELY EXPLAINED BY YOU & BY WAY OF A JURY INSTRUCTION MAY WELL MAKE OR BREAK YOUR CASE.**

- **TO FURTHER CONFUSE THE ISSUE, IN *State v. Van Hubbard,* 751 So.2d 552 (Fla. 1999), THE FLORIDA SUPREME COURT ANNOUNCED THAT "NEGLIGENCE IS NOT AN ELEMENT OF DUI MANSLAUGHTER."**
  - **I BELIEVE THAT WHILE THEY ARE CORRECT IN THAT IT IS NOT AN *ELEMENT* OF THE OFFENSE, IT IS A FACTOR TO BE CONSIDERED IN THE CAUSATION ANALYSIS.**

- **CONSIDER *J.A.C. v. State,* 374 So. 2d 606 (3d. 1979).**
  - **VEHICULAR HOMICIDE CASE, WHERE THE DEF. WAS DRIVING IN AN ILLEGAL DRAG RACE ON A PUBLIC STREET.**
    - **THE PASSENGER, DURING THE RACE, MISTAKENLY GRABBED THE STEERING WHEEL, CAUSING THE DRIVER TO LOSE CONTROL OF THE CAR.**
    - **THE 3RD DCA HELD THIS TO BE "AN INTERVENING CAUSE", IN SPITE OF THE DEFENDANT'S OWN ILLEGAL ACTIONS, AND IT OVERTURNED THE CONVICTION.**

NEW CASE JUST RELEASED

- ***Pennington v. State*, 37 Fla. L. Weekly D2528 (Fla. 5th DCA 2012).**
  - **THE FACTS OF THE CASE WERE SO UNUSUAL "IT COULD ONLY HAPPEN IN A HOLLYWOOD MOVIE."**
  - **INTOXICATED DRIVER.**
  - **MOTORCYCLIST KILLED IN THE ACCIDENT.**
  - **<u>BUT</u> "ODDLY, THERE WERE MOTORCYCLE TRACKS ON THE *ROOF* OF THE DEFENDANT'S SUV."**

- **THERE WAS NO DAMAGE TO THE FRONT FORKS OF THE MOTORCYCLE.**
- **IT WAS CONCLUDED THAT THE MOTORCYCLIST WAS DRIVING, AT NIGHT, IN A "WHEELIE" POSITION (FRONT WHEEL UP) WHEN THE ACCIDENT OCCURRED.**
- **"TO BE CONVICTED OF DUI MANSLAUGHTER IN FLORIDA, THE STATE MUST PROVE THAT AN INDIVIDUAL OPERATED A VEHICLE WHILE IMPAIRED BY ALCOHOL OR WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL <u>AND THAT SUCH OPERATION CAUSED OR CONTRIBUTED TO CAUSING ANOTHER'S DEATH.</u>"**

- **SINCE THE ACCIDENT WITH THE MOTORCYCLIST WOULD HAVE HAPPENED NO MATTER WHAT – WITH OR WITHOUT ALCOHOL – BECAUSE IT WOULD HAVE BEEN IMPOSSIBLE TO SEE THE MOTORCYCLE AS IT WAS DRIVING IN THAT POSITION WITH ITS LIGHTS FACING TOWARD THE SKY, THE CONVICTION WAS OVERTURNED.**

PRACTICE NOTE:

- BEWARE OF PROSECUTORS BEARING JURY INSTRUCTIONS CONCERNING CAUSATION.
- BEWARE OF JUDGES BEARING JURY INSTRUCTIONS CONCERNING CAUSATION.
- OBJECT TO THESE INSTRUCTIONS.
- DRAFT YOUR OWN CAUSATION INSTRUCTIONS BASED UPON THE FACTS OF YOUR CASE AND THE LAW.

MANSLAUGHTER BY DEADLY WEAPON

- UNLESS YOUR CLIENT USES THEIR VEHICLE TO DELIBERATELY RUN SOMEONE OVER, THE ATTEMPT BY THE STATE TO HAVE THE VEHICLE DEFINED AS A "DEADLY WEAPON" SHOULD BE ATTACKED.

Houck v. State, **634 So. 2d 180 (5th DCA 1994).**

- AGGRAVATED BATTERY CASE IN WHICH THE DEFENDANT BANGED THE VICTIM'S HEAD AGAINST THE GROUND & THE STATE TRIED TO HAVE THE PAVEMENT DECLARED A "DEADLY WEAPON".
- GREAT LANGUAGE: "HERE, THE UNDERLYING FALLACY OF THE STATE'S ARGUMENT IS THAT IT MISCONCEIVES THE LEGISLATIVE INTENT UNDERLYING THE RECLASSIFICATION STATUTE. THE OBVIOUS LEGISLATIVE INTENT … IS TO PROVIDE HARSHER PUNISHMENT FOR, AND HOPEFULLY DETER, THOSE PERSONS WHO USE INSTRUMENTS COMMONLY RECOGNIZED AS HAVING THE ***PURPOSE TO INFLICT DEATH OR SERIOUS BODILY INJURY UPON OTHER PERSON. IT IS SAFE TO SAY THAT THE LEGISLATURE DID NOT INTEND TO DISCOURAGE THE PAVING OF PARKING LOTS."***

BLOOD TESTS AND THE DUI CASE

- ***LEGAL* BLOOD v. *MEDICAL* BLOOD**
  - ***LEGAL:*** **Requested by police for prosecution purposes.**
  - ***MEDICAL:*** **Requested by doctors for treatment purposes.**
- **IT IS IMPORTANT TO DETERMINE WHAT *TYPE* OF BLOOD YOU ARE DEALING WITH**
  - **WHY? DIFFERENCES IN:**
    - **DRAWING/COLLECTING;**
    - **STORING;**
    - **TESTING;**
    - **REPORTING RESULTS.**
  - ***LEGAL: WHOLE BLOOD***
  - ***MEDICAL: BLOOD SERUM* (WATER IS REMOVED). ALCOHOL HAS AN AFFINITY FOR THE SERUM.**
    - **BLOOD SERUM: RESULTS 15-20% HIGHER!**

FOR *LEGAL* BLOOD, OBTAIN THE "LITIGATION PACKAGE"!

- **DO NOT SETTLE FOR THE RESULTS CONCLUSION PAGE. OBTAIN THE CHARTS AND GRAPHS AND CHECK THEM (WITH AN EXPERT) FOR THE CORRECT RESULTS.**
  - **DOES THE TESTING INDIVIDUAL HAVE A VALID PERMIT?**
  - **ARE THEY UP TO DATE ON THEIR PROFICIENCY TESTING?**
  - ***QUALI*FICATION (WHAT) VS. *QUANTI*FICATION (HOW MUCH).**

- **EVIDENTIARY DIFFERNCES AS WELL.**
  - ***LEGAL:* MUST MEET CERTAIN ADMINISTRATIVE AND EVIDENTIARY GUIDELINES.**
  - ***MEDICAL:* PURSUANT TO *LOVE V. GARCIA*, 634 So.2d 158 (FLA. 1994) RESULT OF THE BLOOD TEST MAY BE ADMITTED BY A HEARSAY HOSPITAL REPORT.**

LEGAL BLOOD: P.C. REQUIRED FOR A BLOOD DRAW

- **P.C. TO BELIEVE THAT THE SUBJECT IS UNDER INFLUENCE OF ALCOHOL OR DRUGS.**
- **P.C. THAT THEY HAVE *CAUSED* DEATH OR SERIOUS BODILY INJURY**
- **DON'T FORGET THIS 2ND PART.**
- **IT HELPED ME WIN A CASE WHER THE OTHER DRIVER WAS CLEARLY AT FAULT FOR THE ACCIDENT. (*Bergman*)**

P.C. TO DRAW BLOOD IS NOT THE SAME AS P.C. TO ARREST!

- **CASE LAW SUGGESTS A MUCH LOWER LEVEL OF P.C. TO DRAW BLOOD.**
- **ODOR OF ALCOHOL *MAY* BE ENOUGH**
- **REALITY: POLICE DRAW BLOOD IN ALMOST EVERY FATAL ACCIDENT SITUATION.**
- **IN APPROPRIATE CASES, ATTACK THIS!**
- **BLOOD RESULTS: "NO ALCOHOL"**
- **60 PAGE TRAFFIC HOMICIDE REPORT: NO MENTION OF ALCOHOLIC ODOR (*Billie*)**
- **ANY OTHER SMELLS (i.e., officer smells alcohol but not gasoline, transmission fluids)?**

- **WATCH THE NEWSPAPERS AND T.V. FOR OTHER CASES!**
  - **REPORT: "BLOOD DRAWN BY POLICE," NOTE THIS TO SEE IF IT HELPS YOU TO ESTABLISH A PATTERN OF DRAWING BLOOD IN ALL FATALITIES.**
  - **SEEK PERMISSION TO SUBPEONA RECORDS OF ALL BLOOD TEST REQUESTS.**

MANDATORY BLOOD REQUESTS vs. PERMITTED BLOOD REQUESTS

- ***MANDATORY***: Defendant caused an accident involving death or serious bodily injury.
- ***PERMITTED***:
  - Voluntary consent.
  - Breath or urine tests is impracticable or impossible.
  - Determine what type of situation applies.

BLOOD TESTS & VOLUNTARY CONSENT: AN END RUN AROUND THE STATUTE?

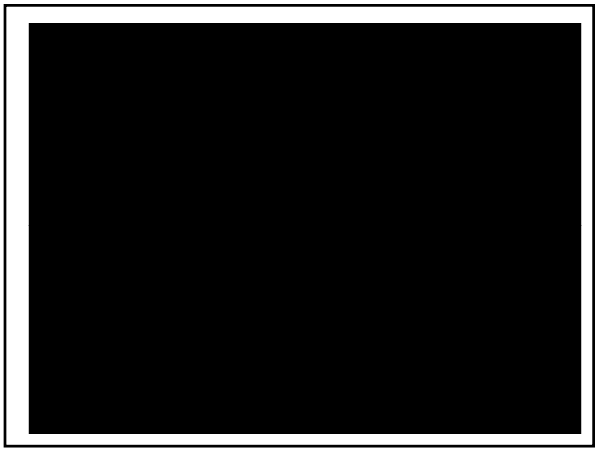
- POLICE ASK CLIENT TO CONSENT/AGREE TO SUBMIT TO A BLOOD TEST.
- CLAIM THAT 316.1933 IS INAPPLICABLE BECAUSE DEFENDANT "CONSENTED"
- DOES THE STATUTE AND/OR CONCEPTS INVOLVING IMPLIED CONSENT AND RIGHT TO REFUSE APPLY?

Sambrine v. State, 386 So.2d 546 (Fla. 1980)

- *BREATH* TEST CASE– WHERE DEFENDANT SUBMITS TO *BREATH* TEST, FAILURE OF OFFICER TO TELL THEM OF RIGHT TO REFUSE IS NOT GROUNDS TO SUPPRESS TEST RESULTS.
- BUT I THINK THE POLICE NEED MORE TO HAVE VOLUNTARY CONSENT (LOOK @ CONFESSION CASES).
  - CIRCUMSTANCES ?
  - IN CUSTODY ?
  - INFORMED OF RIGHT TO REFUSE?
  - LOOK @ CASES INVOLVING GREYHOUND BUS SEARCHES (*U.S. v. Washington*, 151 F.3d 1354 (11th Cir. 1998) WHERE "CONSENT" HELD TO BE INVOLUNTARY WHERE POLICE DID NOT INFORM SUSPECT OF RIGHT TO REFUSE TO GIVE CONSENT TO SEARCH HIS BAG.

UNANIMOUS VERDICTS

- ***Richardson v. U.S.,*** **526 U.S. 813 (1999).**
  - **MOST DUI MANSLAUGHTER CASES PROVEN BY IMPAIRMENT OR UNLAWFUL BLOOD ALCOHOL LEVELS.**
  - **JURY CAN CONVICT, BUT NOT AGREE ON THE ELEMENTS.**
    - **SOME BELIEVE DUBAL, SOME IMPAIRMENT.**
    - **REQUEST A UNANIMOUS VERDICT AS TO THE MANNER OF PROOF & A SPECIAL VERDICT FORM.**



ETHICS IN DUI CASES

By

Michael A. Catalano, Esq., Miami, Moderator
Santo DiGangi, Esq., Assistant State Attorney, Miami
Teresa Enriquez, Esq., Assistant Public Defender, Miami
Brian Tannebaum, Esq., Miami
Michael I. Zemon, Esq., Miami

Case Study Panel Discussion

LICENSE SUSPENSION ISSUES, INTERLOCKS, IMPOUNDMENT AND HOW TO DEAL WITH ALL OF THEM

By

Carlos Pelayo Gonzalez, Esq., Miami

LICENSE ISSUES RELATED TO DUI CASES
CARLOS P. GONZALEZ ESQ.

Arrest and Administrative Suspension. 322.2615

- Client will usually have refusal or DUBAL if in first ten days request formal review
- This allow client to obtain a 30-42 day permit.
- Must be otherwise eligible to have a Florida Driver's License.
- Can get a copy of discovery before the state gives it to you or without requesting discovery.

Formal Review

- After viewing the documents you may subpoena essential witnesses to justify the suspension. This can be used as a mini-depo and gets statements under oath by officer that can be used for impeachment at trial.

Obtaining Hardship License

- Once the permit(s) have expired the client enters into the hard time of the refusal or DUBAL suspension. Hard time is a period of time where the client CANNOT drive legally. It is thirty days for a DUBAL suspension and 90 days for a refusal.
- Once the hard time has expired, if there is no court revocation yet, the client needs only enroll in DUI school to obtain a hardship license. If the client has been convicted of the pending DUI and now has a license revocation, then client must complete DUI school and go through a hardship hearing to qualify for a hardship license.

Hardship License/Permit

- The hardship license/permit allows the client to drive 24 hours a day seven days a week. The driving must be for essential purposes. The court has ruled that this includes work, religious activities, school, medical, groceries. NOT for leisure.

Clients with Multiple DUIs Administrative Suspensions (non CDL)

- 1st DUBAL 6 month suspension, (30day hard time) refusal 1 year (90day hard time).
- 2nd DUBAL 1 year suspension (30 day hard time) 2nd refusal 18 month suspension.
- 3rd or subsequent DUBAL 1 year no permit 3rd or subsequent refusal 18 months no permit.

Ignition Interlock Devices 316.1937

- Required when client convicted of having blood or breath of .15 or above
- Required on 2nd conviction at least 1 years.
- Required on 3rd conviction at least 2 years.
- Fourth is permanent revocation so this is no longer an issue.
- Ownership of the vehicle is not required and must be installed and maintained at client's expense

Results of Conviction

- CDL and other commercial drivers loose that status and loose jobs due to insurance.
- If no 100/300 insurance at time of arrest for DUI, DHSMV will require SR44

insurance. If driving record is bad may require SR 22 insurance.
- Revocations 1st 6 months; 2nd o/s 5yrs 1 year no hardship; 2nd within 5 years 5 years hardship after first year; and 3rd 10 years hardship after 2 4th or subsequent its permanent.
- Any hardship licenses obtained after a second or subsequent DUI will include a supervision program for the client.

Immobilization of Vehicle

- All DUI pleas include by statute 316.193(6)(a) a vehicle impoundment or immobilization.
- First conviction 10 days
- 2nd o/s 5 years 10 days; 2nd within 5 years 30 days
- 3rd within 10 90 days
- Thankfully there are exceptions in the statute (g) family hardship or (h) used solely by an employee of the defendant or business of the defendant.

Carlos Pelayo Gonzalez, Esq. is a former Assistant State Attorney in the DUI misdemeanor division of the Miami-Dade State Attorney's Office. He served as the Drug Court prosecutor and in the Felony Division before joining Albert M. Quirantes in Private Practice. Now Mr. Gonzalez has started his own practice and serves as trial counsel for over half a dozen firms. As a criminal defense litigator he has tried hundreds of bench and jury trials as both a prosecutor and later as a private criminal attorney.

EFFECTIVE MOTION PRACTICE IN DUI CASES

By

Carlos Canet, Esq., Ft. Lauderdale

MASTERS OF DUI 2013

MOTION PRACTICE OUTLINE
(Nuts & Bolts)

I. PRE TRIAL MOTIONS

1. Directly Seeking Judicial Action (Game Changing Action)

A. Motion in Liminie
B. Motion To Dimiss
C. Motion To Suppress
D. Motion To Exclude

2. In Direct Judicial Action (Typically)

A. Motion To Compel
B. Motion To Continue
C. Motions affecting bond/custodial status
D. Others
i. Not subject of present lecture

II. MOTIONS IN LIMINE

1. Based Upon Evidence Code
A. Fla. Evid. Code §§ 90.402, 403 and §§ 90.802, 803 and 804

2. RELEVANCY/Materiality v. Prejudicial Effect
A. 90.402:
"All relevant evidence is admissible."
i. Relevant evidence must tend to prove or disprove a *material* fact.
B. 90.403:
"Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

C. Weight v. Admissibilty
i. FSTs
a. Scientific vs. Lay Observations

3. HEARSAY
A. 90.802:
"Except as provided by statute, hearsay evidence is inadmissible."

B. 90.803 and 804:
EXCEPTIONS

C. Past Recollection Recorded vs. Police Reports

1. 90.803(8):

"....excluding in criminal cases matters observed by a police officer or other law enforcement personnel...."

2. *Hendrieth v. State*, 483 So.2d 768, 769(Fla 1st DCA 1986):

"Police reports themselves are specifically excluded from the exception for public records and reports."

a. The Wacky 17th Circuit

i. *State of Florida v. Kromke*, 17 F.L.Weekly Supp. 904a says cops with no memory can read reports

ii. *State of Florida v. Chin*, 17 F.L Weekly Supp. 833b says cops with no memory cannot read from their reports

iii. *State of Florida v. Donner*, 11 F.L. Weekly Supp. 976b says cops with no memory cannot read from reports

III. MOTIONS TO DISMISS

1. Fla. Rule Crim. Pro. 3.190(c)(4)

A. Requirements:

i. NO Material Disputed Facts
ii. Undisputed Material Facts Do Not Equal PFC
iii. Must Be SWORN
iv. State May TRAVERSE

B. Motion To STRIKE Traverse

i. *State v. Kalogeropolous*, 758 So.2d 110 (Fla. 2000) (Discusses sufficiency of Traverse).

2. STRATEGIC TOOL

A. Test the State's Case
B. No Exposure to the Client

i. SBI Example

1. Fla. Stat. 316.1933(1)(b):

a. Substantial Risk of Death?
b. Serious Personal Disfigurement?
c. Protracted Loss or Impairment?

3. CONSTITUTIONAL GROUNDS - DUE PROCESS VIOLATION

A. Destruction of Evidence - VIDEO

1. MATERIALITY

a. Equal to Exculpatory

b. Regardless of Good or Bad Faith

2. POLICE MISCONDUCT
   a. Failure to Follow Established Policy
   b. No Finding of Materiality Required
   c. Presumption Evidence Was Exculpatory

3. LEADING CASES
   a. *Arizona v. Youngblood*, 488 U.S. 51 (1988)
      Leading case laid out legal requirements for relief. If Def. demonstrated materiality or bad faith, burden shifted to state to show no violation of due process.
   b. *State v. Powers*, 555 So.2d 888, 889 (Fla. 2d DCA 1990)
      In the absence of formal policy regarding gathering of evidence cops not obligated to gather evidence in any particular fashion. Due process violated irrespective of good or bad faith if favorable evidence suppressed by government.
   c. *State v. Davis*, 14 So.3d 1130 (Fla. 4th DCA 2009)
      Where lost or unpreserved evidence is material exclupatory evidence, the loss is a violation of due process and good or bad faith is irrelevant.

III. MOTIONS TO SUPPRESS

1. Legal Grounds
   A. U.S. CONSTITUTIONAL AMENDMENTS
      i. Fourth Amendment Search & Seizure
      ii. Applied to States through 14th Amendment, *MAPP v OHIO*

   B. FLORIDA CONSTITUTION
      i. Article I, Section 12 (Search & Seizure)
         a. Adopted SCOTUS Opinions Regarding 4th Amendment
      ii. Article I, Section 9 (Due Process)

   C. Fla. Rule Crim. Pro. 3.190(g)

      i. (g)(1): Aggrieved by Unlawful S & S, because:
         (A) "Property" illegally seized without a warrant
      ii. Property equals Evidence
      iii. Sections (B) thru (E) Regarding Sufficiency of Warrant

      iv. Present Context: Warrants Seeking Hospital Blood Vials
         1. Law heavily favors finding of PC by "neutral" magistrate

      v. (2) CONTENTS
         1. State Clearly Particular Evidence Sought to be Suppressed
         2. Reasons For Suppression

3. General Statement of the Facts

vi. (3) HEARING

"Before hearing evidence, the court shall determine if the motion is legally sufficient. If it is not, the motion shall be denied. If the court hears the motion on its merits, the defendant shall present evidence supporting the defendant's position and the state may offer rebuttal evidence."

vii. PROBLEMS/CASES

1. *State v. Setzler*, 667 So.2d 343 (Fla. 1st DCA 1995)
   Provision contemplates searches pursuant to warrants and does not describe procedure for searches without warrants, e.g., vehicles stops. Def. required only to make initial showing. Absence of warrant equals initial showing.

2. *State v. Hinton*, 305 So.2d 804 (Fla 4th DCA 1975)
   State complained that motion did not equal evidence, nor was judicial notice of court file sufficient to satisfy burden of moving party.
   Burden of moving party is met by motion asserting the absence of a warrant and the court taking judicial notice of the absence of a warrant. Burden then shifts to state to demonstrate search was lawful.

viii. POSITIVELY No Application to VEHICLE STOP Motions

1. DRIVER ALWAYS HAS STANDING
2. COURT FILE NEVER CONTAINS A WARRANT

D. Fla. R. Crim. Pro. 3.190(h) STATEMENTS

i. (1) Grounds

1. Court may on its own motion suppress any confession or admission illegally obtained.

ii. (2) Contents

1. Identify Statement with Particularity
2. Reasons for Suppression
   a. Roadside Violation of *Miranda*
3. General Statement of Facts

E. STATUTORY AUTHORITY

i. Fla. Stat. 901.15 (Misdemeanor Arrests Without Warrant

1. Exceptions:
   A. (1) Misdemeanor Committed In Officer Presence
   B. (5) Violation of s. 316, "Fresh Pursuit"

ii. Fla. Stat. 316.645 (Accident Scene):

> "A police officer who makes an investigation at the scene of a crash may arrest any driver of a vehicle involved in the crash when, *based upon personal investigation*, the officer has reasonable and probable grounds to believe that the person committed any offense under the provisions of this chapter, chapter 320, or chapter 322 in connection with the crash."

iii. FLORIDA IMPLIED CONSENT

1. Fla. Stat. 316.1932
   a. Implied Consent Warning (1)(a)1.a.
   b. Urine Collection (Reasonable Cause) (1)(a)1.b.
   c. Breath or Urine Impractical or Impossible (Blood Draw) (1)(b) 2.c.
      I. Appears at Medical Facility: Hospital or Ambulance
      II. Must Be Under Lawful Arrest.
      State v. Slaney, 653 So.2d 422 (Fla. 3d DCA 1995)
   d. Medical Blood Draw (1)(f) 1
   e. Independent Test (1)(d)

2. Fla. Stat. 316.1933(1): PC for Blood Draw
   a. Death or Serious Bodily Injury
   b. Causation
      I. Policy? Etoh + Death = Draw
      II. Under Influence in Statute Equals Normal Faculties Impaired. *State v. Brown*, 725 So.2d 441 (Fla. 5th DCA 1999)

IV. MOTIONS TO EXCLUDE

A. Florida Implied Consent: SUBSTANTIAL COMPLIANCE PROVISIONS

1. Fla. Stat. 316.1932(1)(a)2
2. Fla. Stat. 316.1932(1)(f)1
3. Fla. Stat. 316.1934(3)

B. PROVISIONS STATE:
   1. Chemical Test Results are Valid When Obtained In Substantial Compliance
   2. State Has Burden Of Demonstrating Substantial Compliance
   3. Any Insubstantial Deviation Will Not Results In Exclusion

C. Florida Administrative Code 11D-8, et seq., and Associated FDLE Forms

1. Most Frequent Violations:

   a. 20 Minute Deprivation Period, 11D-8.007(3)
   b. Failed Inspection, 11D-8.004(3) & 8.006(1)

2. More Exotic
    a. Failure of Regs To Provide For Flow Sensor Inspection
    b. Failure of FDLE to Evaluate & Approve Exhaust Block Check Valve Modification

Supreme Court of the United States
ARIZONA, Petitioner,
v.
Larry YOUNGBLOOD.

No. 86–1904.
Argued Oct. 11, 1988.
Decided Nov. 29, 1988.
Rehearing Denied Jan. 23, 1989.
See 488 U.S. 1051, 109 S.Ct. 885.

Defendant was convicted by the Superior Court, Pima County, J. Richard Hannah, J., of child molestation, sexual assault, and kidnaping, and he appealed. The Arizona Court of Appeals, 153 Ariz. 50, 734 P.2d 592, reversed, and the State of Arizona petitioned for review. The Supreme Court of Arizona denied petition, and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that failure of police to preserve potentially useful evidence was not denial of due process of law absent defendant's showing bad faith on part of police.

Reversed.

Justice Stevens filed an opinion concurring in the judgment.

Justice Blackmun filed a dissenting opinion, in which Justices Brennan and Marshall joined.

Opinion on remand, 164 Ariz. 61, 790 P.2d 759.

West Headnotes

[1] Constitutional Law 92 ⚿4594(8)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(8) k. Duty to Preserve. Most Cited Cases
(Formerly 92k268(5))

Criminal Law 110 ⚿2010

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)3 Destruction or Loss of Information
110k2010 k. In General. Most Cited Cases
(Formerly 110k700(9))

Failure of police to preserve potentially useful evidence is not a denial of due process of law unless defendant can show bad faith on part of police; requiring defendant to show bad faith both limits extent of police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where interests of justice most clearly require it, that is, those cases in which police themselves by their conduct indicate that evidence could form basis for exonerating defendant. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 ⚿4594(7)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(7) k. Duty to Conduct or Allow Testing or Other Analysis. Most Cited Cases
(Formerly 92k268(5))

Criminal Law 110 ⚿2011

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)3 Destruction or Loss of Information

110k2011 k. Excuse or Justification for Destruction or Loss. Most Cited Cases
(Formerly 110k700(9))

Defendant was not denied due process of law by failure of police, in investigating sexual assault of ten-year-old boy, to refrigerate boy's clothing and to perform tests on semen samples, thereby preserving potentially useful evidence for defendant, where there was no suggestion of bad faith on part of police; none of this information was concealed from defendant at trial, and evidence—such as it was—was made available to defendant's expert who declined to perform any tests on samples. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ⚿4594(7)

92 Constitutional Law
92XXVII Due Process
92XXVII(II) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(7) k. Duty to Conduct or Allow Testing or Other Analysis. Most Cited Cases
(Formerly 92k268(5))

Criminal Law 110 ⚿2004

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k2002 Information Within Knowledge of Prosecution
110k2004 k. Duty to Locate Information. Most Cited Cases
(Formerly 110k700(9))

Failure of police to test semen samples with newer test device, in investigation of sexual assault of ten-year-old boy, did not violate due process clause. U.S.C.A. Const.Amend. 14.

****333** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***51** The victim, a 10–year–old boy, was molested and sodomized by a middle-aged man for 1 1/2 hours. After the assault, the boy was taken to a hospital where a physician used a swab from a "sexual assault kit" to collect semen samples from the boy's rectum. The police also collected the boy's clothing, which they failed to refrigerate. A police criminologist later performed some tests on the rectal swab and the boy's clothing, but he was unable to obtain information about the identity of the boy's assailant. At trial, expert witnesses testified that respondent might have been completely exonerated by timely performance of tests on properly preserved semen samples. ****334** Respondent was convicted of child molestation, sexual assault, and kidnapping in an Arizona state court. The Arizona Court of Appeals reversed the conviction on the ground that the State had breached a constitutional duty to preserve the semen samples from the victim's body and clothing.

Held: The Due Process Clause of the Fourteenth Amendment did not require the State to preserve the semen samples even though the samples might have been useful to respondent. Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Here, the police's failure to refrigerate the victim's clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence—such as it was—was made available to respondent's expert, who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion—and this Court agrees—that there was no suggestion of bad faith on the part of the police. Moreover, the Due Process Clause was not violated because the State failed to perform a newer test on the semen samples. The police do not have a constitutional duty to perform any particular tests. Pp. 336–338.

153 Ariz. 50, 734 P.2d 592, reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and

KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post,* p. 338. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 339.

***52** *John R. Gustafson* argued the cause for petitioner. With him on the brief were *Stephen D. Neely, James M. Howard,* and *Deborah Strange Ward.*

Daniel F. Davis argued the cause and filed a brief for respondent.

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent Larry Youngblood was convicted by a Pima County, Arizona, jury of child molestation, sexual assault, and kidnaping. The Arizona Court of Appeals reversed his conviction on the ground that the State had failed to preserve semen samples from the victim's body and clothing. 153 Ariz. 50, 734 P.2d 592 (1986). We granted certiorari to consider the extent to which the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant.

On October 29, 1983, David L., a 10–year–old boy, attended a church service with his mother. After he left the service at about 9:30 p.m., the boy went to a carnival behind the church, where he was abducted by a middle-aged man of medium height and weight. The assailant drove the boy to a secluded area near a ravine and molested him. He then took the boy to an unidentified, sparsely furnished house where he sodomized the boy four times. Afterwards, the assailant tied the boy up while he went outside to start his car. Once the assailant started the car, albeit with some difficulty, he returned to the house and again sodomized the boy. The assailant then sent the boy to the bathroom to wash up before he returned him to the carnival. He threatened to kill the boy if he told anyone about the attack. The entire ordeal lasted about 1 1/2 hours.

After the boy made his way home, his mother took him to Kino Hospital. At the hospital, a physician treated the boy for rectal injuries. The physician also used a "sexual assault kit" to collect evidence of the attack. The Tucson Police Department***53** provided such kits to all hospitals in Pima County for use in sexual assault cases. Under standard procedure, the victim of a sexual assault was taken to a hospital, where a physician used the kit to collect evidence. The kit included paper to collect saliva samples, a tube for obtaining a blood sample, microscopic slides for making****335** smears, a set of Q-Tip-like swabs, and a medical examination report. Here, the physician used the swab to collect samples from the boy's rectum and mouth. He then made a microscopic slide of the samples. The doctor also obtained samples of the boy's saliva, blood, and hair. The physician did not examine the samples at any time. The police placed the kit in a secure refrigerator at the police station. At the hospital, the police also collected the boy's underwear and T-shirt. This clothing was not refrigerated or frozen.

Nine days after the attack, on November 7, 1983, the police asked the boy to pick out his assailant from a photographic lineup. The boy identified respondent as the assailant. Respondent was not located by the police until four weeks later; he was arrested on December 9, 1983.

On November 8, 1983, Edward Heller, a police criminologist, examined the sexual assault kit. He testified that he followed standard department procedure, which was to examine the slides and determine whether sexual contact had occurred. After he determined that such contact had occurred, the criminologist did not perform any other tests, although he placed the assault kit back in the refrigerator. He testified that tests to identify blood group substances were not routinely conducted during the initial examination of an assault kit and in only about half of all cases in any event. He did not test the clothing at this time.

Respondent was indicted on charges of child molestation, sexual assault, and kidnaping. The State moved to compel respondent to provide blood and saliva samples for comparison with the material gathered through the use of the sexual assault kit, but the trial court denied the motion on the ***54** ground that the State had not obtained a sufficiently large semen sample to make a valid comparison. The prosecutor then asked the State's criminologist to perform an ABO blood group test on the rectal swab sample in an attempt to ascertain the blood type of the boy's assailant. This test failed to detect any blood group substances in the sample.

In January 1985, the police criminologist examined the boy's clothing for the first time. He found one semen stain on the boy's underwear and another on the rear of his T-shirt. The criminologist tried to obtain blood group substances from both stains using the ABO technique, but was unsuccessful. He also performed a P–30 protein molecule test on the stains, which indicated that only a small quantity of semen was present on the clothing; it was inconclusive as to the assailant's identity. The Tucson Police Department had just begun using this test, which was then used in slightly more than half of the crime laboratories in the country.

Respondent's principal defense at trial was that the boy had erred in identifying him as the perpetrator of the crime. In this connection, both a criminologist for the State and an expert witness for respondent testified as to what might have been shown by tests performed on the samples shortly after they were gathered, or by later tests performed on the samples from the boy's clothing had the clothing been properly refrigerated. The court instructed the jury that if they found the State had destroyed or lost evidence, they might "infer that the true fact is against the State's interest." 10 Tr. 90.

The jury found respondent guilty as charged, but the Arizona Court of Appeals reversed the judgment of conviction. It stated that " 'when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.' " 153 Ariz., at 54, 734 P.2d, at 596, quoting *State v. Escalante*, 153 Ariz. 55, 61, 734 P.2d 597, 603 (App.1986). The Court of Appeals***55** concluded on the basis of the expert testimony at trial that timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated respondent. The Court of Appeals ****336** reached this conclusion even though it did "not imply any bad faith on the part of the State." 153 Ariz., at 54, 734 P.2d, at 596. The Supreme Court of Arizona denied the State's petition for review, and we granted certiorari. 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988). We now reverse.

Decision of this case requires us to again consider "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela–Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982). In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), we held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87, 83 S.Ct., at 1196. In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), we held that the prosecution had a duty to disclose some evidence of this description even though no requests were made for it, but at the same time we rejected the notion that a "prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." *Id.*, at 111, 96 S.Ct., at 2401; see also *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

There is no question but that the State complied with *Brady* and *Agurs* here. The State disclosed relevant police reports to respondent, which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.

***56** If respondent is to prevail on federal constitutional grounds, then, it must be because of some constitutional duty over and above that imposed by cases such as *Brady* and *Agurs*. Our most recent decision in this area of the law, *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), arose out of a drunk-driving prosecution in which the State had introduced test results indicating the concentration of alcohol in the blood of two motorists. The defendants sought to suppress the test results on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, "the officers here were acting in 'good faith and in accord with their normal practice,' " *id.*, at 488, 104 S.Ct., at 2533, quoting *Killian v. United States*, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961); second, in the light of the procedures actually used the chances that preserved samples would have excul-

pated the defendants were slim, 467 U.S., at 489, 104 S.Ct., at 2534; and, third, even if the samples might have shown inaccuracy in the tests, the defendants had "alternative means of demonstrating their innocence." *Id.*, at 490, 104 S.Ct., at 2534. In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta*, but here, unlike in *Trombetta*, the State did not attempt to make any use of the materials in its own case in chief.[FN*]

FN* In this case, the Arizona Court of Appeals relied on its earlier decision in *State v. Escalante*, 153 Ariz. 55, 734 P.2d 597 (1986), holding that " 'when identity is an issue at trial and the police permit destruction of evidence that *could eliminate* a defendant as the perpetrator, such loss is material to the defense and is a denial of due process.' " 153 Ariz. 50, 54, 734 P.2d 592, 596 (1986), quoting *Escalante, supra*, at 61, 734 P.2d, at 603 (emphasis added). The reasoning in *Escalante* and the instant case mark a sharp departure from *Trombetta* in two respects. First, *Trombetta* speaks of evidence whose exculpatory value is "apparent." 467 U.S., at 489, 104 S.Ct., at 2534. The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*. Second, we made clear in *Trombetta* that the exculpatory value of the evidence must be apparent "*before* the evidence was destroyed." *Ibid.* (emphasis added). Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was simply an avenue of investigation that might have led in any number of directions. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. Cf. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959).

***57 **337** Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), we said that "[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.*, at 325, 92 S.Ct., at 466; see also *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977). Similarly, in *United States v. Valenzuela–Bernal, supra*, we considered whether the Government's deportation of two witnesses who were illegal aliens violated due process. We held that the prompt deportation of the witnesses was justified "upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." *Id.*, 458 U.S., at 872, 102 S.Ct., at 3449.

[1] The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta, supra*, 467 U.S., at 486, 104 S.Ct., at 2532, that "[w]henever potentially exculpatory***58** evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, see *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate

that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

[2] In this case, the police collected the rectal swab and clothing on the night of the crime; respondent was not taken into custody until six weeks later. The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence—such as it was—was made available to respondent's expert who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion—and we **338 agree—that there was no suggestion of bad faith on the part of the police. It follows, therefore, from what we have said, that there was no violation of the Due Process Clause.

[3] The Arizona Court of Appeals also referred somewhat obliquely to the State's "inability to quantitatively test" certain semen samples with the newer P–30 test. 153 Ariz., at 54, 734 P.2d, at 596. If the court meant by this statement *59 that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.

The judgment of the Arizona Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Justice STEVENS, concurring in the judgment.

Three factors are of critical importance to my evaluation of this case. First, at the time the police failed to refrigerate the victim's clothing, and thus negligently lost potentially valuable evidence, they had at least as great an interest in preserving the evidence as did the person later accused of the crime. Indeed, at that time it was more likely that the evidence would have been useful to the police—who were still conducting an investigation—and to the prosecutor—who would later bear the burden of establishing guilt beyond a reasonable doubt—than to the defendant. In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence.

Second, although it is not possible to know whether the lost evidence would have revealed any relevant information, it is unlikely that the defendant was prejudiced by the State's omission. In examining witnesses and in her summation, defense counsel impressed upon the jury the fact that the State failed to preserve the evidence and that the State could have conducted tests that might well have exonerated the defendant. See App. to Pet. for Cert. C21–C38, C42–C45; 9 Tr. 183–202, 207–208; 10 Tr. 58–61, 69–70. More significantly, the trial judge instructed the jury: "If you find that the State has ... allowed to be destroyed or lost any evidence whose *60 content or quality are in issue, you may infer that the true fact is against the State's interest." 10 Tr. 90. As a result, the uncertainty as to what the evidence might have proved was turned to the defendant's advantage.

Third, the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant suggests that the lost evidence was "immaterial." Our cases make clear that "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," and that a State's failure to turn over (or preserve) potentially exculpatory evidence therefore "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976) (footnotes omitted); see also *California v. Trombetta*, 467 U.S. 479, 488, 104 S.Ct. 2528, 2533, 81 L.Ed.2d 413 (1984) (duty to preserve evidence "must be limited to evidence that might be expected to play a significant role in the suspect's defense"). In declining defense counsel's and the court's invitations to draw the permissive inference, the jurors in effect indicated that, in their view, the other evidence at trial was so overwhelming that it was highly improbable that the lost evidence was exculpatory. In *Trombetta*, this Court found no due process violation because "the chances [were] extremely low that preserved **339 [breath] samples would have been exculpatory." *Id.*, at 489, 104 S.Ct., at 2534. In this case, the jury has already

performed this calculus based on its understanding of the evidence introduced at trial. Presumably, in a case involving a closer question as to guilt or innocence, the jurors would have been more ready to infer that the lost evidence was exculpatory.

With these factors in mind, I concur in the Court's judgment. I do not, however, join the Court's opinion because it announces a proposition of law that is much broader than necessary to decide this case. It states that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a ***61** denial of due process of law." *Ante*, at 337. In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair. This, however, is not such a case. Accordingly, I concur in the judgment.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

The Constitution requires that criminal defendants be provided with a fair trial, not merely a "good faith" try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law. In reversing the judgment of the Arizona Court of Appeals, this Court, in my view, misreads the import of its prior cases and unduly restricts the protections of the Due Process Clause. An understanding of due process demonstrates that the evidence which was allowed to deteriorate was "constitutionally material," and that its absence significantly prejudiced respondent. Accordingly, I dissent.

I

The Court, with minimal reference to our past cases and with what seems to me to be less than complete analysis, announces that "unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Ante*, at 337. This conclusion is claimed to be justified because it limits the extent of police responsibility "to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Ibid.* The majority has identified clearly one type of violation, for police action affirmatively ***62** aimed at cheating the process undoubtedly violates the Constitution. But to suggest that this is the only way in which the Due Process Clause can be violated cannot be correct. Regardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process.

The Court's most recent pronouncement in "what might loosely be called the area of constitutionally guaranteed access to evidence," *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982), is in *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). *Trombetta* addressed "the question whether the Fourteenth Amendment ... demands that the State preserve potentially exculpatory evidence on behalf of defendants." *Id.*, at 481, 104 S.Ct., at 2530. Justice MARSHALL, writing for the Court, noted that while the particular question was one of first impression, the general standards to be applied had been developed in a number of cases, including *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).[FN1] Those ***63** ****340** cases in no way require that government actions that deny a defendant access to material evidence be taken in bad faith in order to violate due process.

> FN1. The Court's discussion in *Trombetta* also noted other cases: In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1117 (1959), the prosecution failed to inform the defense and the trial court that one of its witnesses had testified falsely that he had not been promised favorable treatment in return for testifying. The Court noted that a conviction obtained by the knowing use of such testimony must fall, and suggested that the conviction is invalid even when the perjured testimony is " 'not the result of guile or a desire to prejudice ... for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.' " *Id.*, at 270, 79 S.Ct., at 1177, quoting *People v.*

Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 886–888, 136 N.E.2d 853, 854–855 (1956). In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Court required a federal prosecutor to reveal a promise of nonprosecution if a witness testified, holding that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Id.*, at 154, 92 S.Ct., at 766. The good faith of the prosecutor thus was irrelevant for purposes of due process. And in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Court held that in some cases the Government must disclose to the defense the identity of a confidential informant. There was no discussion of any requirement of bad faith.

As noted by the majority, *ante*, at 336, the Court in *Brady* ruled that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87, 83 S.Ct., at 1196. The *Brady* Court went on to explain that the principle underlying earlier cases, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (violation of due process when prosecutor presented perjured testimony), is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U.S., at 87, 83 S.Ct., at 1196. The failure to turn over material evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile.' " *Id.*, at 88, 83 S.Ct., at 1197 (quoting lower court opinion).

In *Trombetta*, the Court also relied on *United States v. Agurs*, 427 U.S., at 107, 96 S.Ct., at 2399, which required a prosecutor to turn over to the defense evidence that was "clearly supportive of a claim of innocence" even without a defense request. The Court noted that the prosecutor's duty was not one of constitutional dimension unless the evidence was such that its "omission deprived the defendant of a fair trial," *id.*, at 108, 96 S.Ct., at 2399, and explained:

"Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it.... If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not ***64** the character of the prosecutor." *Id.*, at 110, 96 S.Ct., at 2400 (footnote omitted).[FN2]

FN2. The *Agurs* Court went on to note that the standard to be applied in considering the harm suffered by the defendant was different from the standard applied when new evidence is discovered by a neutral source after trial. The prosecutor is "the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' " 427 U.S., at 111, 96 S.Ct., at 2401, quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Holding the prosecution to a higher standard is necessary, lest the "special significance to the prosecutor's obligation to serve the cause of justice" be lost. 427 U.S., at 111, 96 S.Ct., at 2401.

Agurs thus made plain that the prosecutor's state of mind is *not* determinative. Rather, the proper standard must focus on the materiality of the evidence, and that standard "must reflect our overriding concern with the justice of the finding of guilt." *Id.*, at 112, 96 S.Ct., at 2401.[FN3]

FN3. Nor does *United States v. Valenzuela–Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), provide support for the majority's "bad faith" requirement. In that case a defendant was deprived of certain testimony at his trial when the Government deported potential witnesses after determining that they possessed no material evidence relevant to the criminal trial. These deportations were not the result of malice or negligence, but were carried out pursuant to immigration policy. *Id.*, at 863–866, 102 S.Ct., at 3444–3446. Consideration of the Government's motive was only the first step in the due process inquiry. Because the Government acted in good faith, the defendant was required to make "a plausible showing"

that "the evidence lost would be both material and favorable to the defense." *Id.*, at 873, 102 S.Ct., at 3449. In *Valenzuela–Bernal*, the defendant was not able to meet that burden. Under the majority's "bad faith" test, the defendant would have no opportunity to try.

****341** *Brady* and *Agurs* could not be more clear in their holdings that a prosecutor's bad faith in interfering with a defendant's access to material evidence is *not* an essential part of a due process violation. Nor did *Trombetta* create such a requirement. *Trombetta* 's initial discussion focused on the due process requirement "that criminal defendants be afforded a meaningful opportunity to present a complete defense," 467 U.S., at 485, 104 S.Ct., at 2532, and then noted that the delivery of exculpatory evidence to the defendant "protect[s] the innocent from erroneous***65** conviction and ensur [es] the integrity of our criminal justice system." *Ibid.* Although the language of *Trombetta* includes a quotation in which the words "in good faith" appear, those words, for two reasons, do not have the significance claimed for them by the majority. First, the words are the antecedent part of the fuller phrase "in good faith and in accord with their normal practice." *Id.*, at 488, 104 S.Ct., at 2533. That phrase has its source in *Killian v. United States*, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961), where the Court held that the practice of discarding investigators' notes, used to compile reports that were then received in evidence, did not violate due process.[FN4] In both *Killian* and *Trombetta*, the importance of police compliance with *usual procedures* was manifest. Here, however, the same standard of conduct cannot be claimed. There has been no suggestion that it was the usual procedure to ignore the possible deterioration of important evidence, or generally to treat material evidence in a negligent or reckless manner. Nor can the failure to refrigerate the clothing be squared with the careful steps taken to preserve the sexual-assault kit. The negligent or reckless failure to preserve important evidence just cannot be "in accord with ... normal practice."

FN4. In *Killian*, the notes in question related to witnesses' statements, were used to prepare receipts which the witnesses then signed, and were destroyed in accord with usual practice. 368 U.S., at 242, 82 S.Ct., at 308. Had it not been the usual practice of the agents to destroy their notes, or if no reports had been prepared from those notes before they were destroyed, a different question, closer to the one the Court decides today, would have been presented.

Second, and more importantly, *Trombetta* demonstrates that the absence of bad faith does not end the analysis. The determination in *Trombetta* that the prosecution acted in good faith and according to normal practice merely prefaced the primary inquiry, which centers on the "constitutional materiality" of the evidence itself. 467 U.S., at 489, 104 S.Ct., at 2534. There is ***66** nothing in *Trombetta* that intimates that good faith alone should be the measure.[FN5]

FN5. The cases relied upon by the majority for the proposition that bad faith is necessary to show a due process violation, *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), concerned claims that preindictment delay violated due process. The harm caused by such delay is certainly more speculative than that caused by the deprivation of material exculpatory evidence, and in such cases statutes of limitations, not the Due Process Clause, provide the primary protection for defendants' interests. Those cases are a shaky foundation for the radical step taken by the Court today.

The cases in this area clearly establish that police actions taken in bad faith are not the only species of police conduct that can result in a violation of due process. As *Agurs* points out, it makes no sense to overturn a conviction because a malicious prosecutor withholds information that he mistakenly believes to be material, but ****342** which actually would have been of no help to the defense. 427 U.S., at 110, 96 S.Ct., 2400. In the same way, it makes no sense to ignore the fact that a defendant has been denied a fair trial because the State allowed evidence that was material to the defense to deteriorate beyond the point of usefulness, simply because the police were inept rather than malicious.

I also doubt that the "bad faith" standard creates the bright-line rule sought by the majority. Apart from the inherent difficulty a defendant would have

in obtaining evidence to show a lack of good faith, the line between "good faith" and "bad faith" is anything but bright, and the majority's formulation may well create more questions than it answers. What constitutes bad faith for these purposes? Does a defendant have to show actual malice, or would recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence, be sufficient? Does "good faith police work" require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the evidence refrigerator, be considered to be acting in good faith? While the majority leaves these questions for ***67** another day, its quick embrace of a "bad faith" standard has not brightened the line; it only has moved the line so as to provide fewer protections for criminal defendants.

II

The inquiry the majority eliminates in setting up its "bad faith" rule is whether the evidence in question here was "constitutionally material," so that its destruction violates due process. The majority does not say whether "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," *ante,* at 337, is, for purposes of due process, material. But because I do not find the question of lack of bad faith dispositive, I now consider whether this evidence was such that its destruction rendered respondent's trial fundamentally unfair.

Trombetta requires that a court determine whether the evidence possesses "an exculpatory value that was apparent before the evidence was destroyed," and whether it was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S., at 489, 104 S.Ct., at 2534. In *Trombetta* neither requirement was met. But it is important to note that the facts of *Trombetta* differed significantly from those of this case. As such, while the basic standards set by *Trombetta* are controlling, the inquiry here must be more finely tuned.

In *Trombetta,* samples of breath taken from suspected drunk drivers had been discarded after police had tested them using an Intoxilyzer, a highly accurate and reliable device for measuring blood-alcohol concentration levels. *Id.,* at 481–482, 104 S.Ct., at 2530. The Court reasoned that the likelihood of the posttest samples proving to be exculpatory was extremely low, and further observed that the defendants were able to attack the reliability of the test results by presenting evidence of the ways in which the Intoxilyzer might have malfunctioned. This case differs from *Trombetta* in that here no ***68** conclusive tests were performed on the relevant evidence. There is a distinct possibility in this case, one not present in *Trombetta,* that a proper test would have exonerated respondent, unrebutted by any other conclusive test results. As a consequence, although the discarded evidence in *Trombetta* had impeachment value (*i.e.,* it might have shown that the test results were incorrect), here what was lost to the respondent was the possibility of complete exoneration. *Trombetta* 's specific analysis, therefore, is not directly controlling.

The exculpatory value of the clothing in this case cannot be determined with any certainty, precisely because the police allowed the samples to deteriorate. But we do know several important things about the ****343** evidence. First, the semen samples on the clothing undoubtedly came from the assailant. Second, the samples could have been tested, using technology available and in use at the local police department, to show either the blood type of the assailant, or that the assailant was a nonsecreter, *i.e.,* someone who does not secrete a blood-type "marker" into other body fluids, such as semen. Third, the evidence was clearly important. A semen sample in a rape case where identity is questioned is always significant. See *Hilliard v. Spalding,* 719 F.2d 1443, 1446–1447 (CA9 1983); *People v. Nation,* 26 Cal.3d 169, 176–177, 161 Cal.Rptr. 299, 302–304, 604 P.2d 1051, 1054–1055 (1980). Fourth, a reasonable police officer should have recognized that the clothing required refrigeration. Fifth, we know that an inconclusive test was done on the swab. The test suggested that the assailant was a nonsecreter, although it was equally likely that the sample on the swab was too small for accurate results to be obtained. And, sixth, we know that respondent is a secreter.

If the samples on the clothing had been tested, and the results had shown either the blood type of the assailant or that the assailant was a nonsecreter, its constitutional materiality would be clear. But the State's conduct has deprived the defendant, and the courts, of the opportunity to determine with certainty the import of this evidence: it has "interfere[d] with ***69** the accused's ability to present a defense by im-

posing on him a requirement which the government's own actions have rendered impossible to fulfill." *Hilliard v. Spalding*, 719 F.2d, at 1446. Good faith or not, this is intolerable, unless the particular circumstances of the case indicate either that the evidence was not likely to prove exculpatory, or that the defendant was able to use effective alternative means to prove the point the destroyed evidence otherwise could have made.

I recognize the difficulties presented by such a situation.[FN6] The societal interest in seeing criminals punished rightly requires that indictments be dismissed only when the unavailability of the evidence prevents the defendant from receiving a fair trial. In a situation where the substance of the lost evidence is known, the materiality analysis laid out in *Trombetta* is adequate. But in a situation like the present one, due process requires something more. Rather than allow a State's ineptitude to saddle a defendant with an impossible burden, a court should focus on the type of evidence, the possibility it might prove exculpatory, and the existence of other evidence going to the same point of contention in determining whether the failure to preserve the evidence in question violated due process. To put it succinctly, where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.

> FN6. We noted in *California v. Trombetta*, 467 U.S. 479, 486, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984): "The absence of doctrinal development in this area reflects, in part, the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight. Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." While the inquiry is a difficult one, I do not read *Trombetta* to say, nor do I believe, that it is impossible. Respect for constitutional rights demands that the inquiry be made.

***70** The first inquiry under this standard concerns the particular evidence itself. It must be of a type which is clearly relevant, a requirement satisfied, in a case where identity is at issue, by physical evidence which has come from the assailant. Samples of blood and other body fluids, fingerprints, and hair and tissue samples have been used to implicate guilty defendants, and to exonerate innocent suspects. This is not to say that all physical evidence of this type must be preserved. For example, in a case where a blood sample is found, but the circumstances make it unclear ****344** whether the sample came from the assailant, the dictates of due process might not compel preservation (although principles of sound investigation might certainly do so). But in a case where there is no doubt that the sample came from the assailant, the presumption must be that it be preserved.

A corollary, particularly applicable to this case, is that the evidence embody some immutable characteristic of the assailant which can be determined by available testing methods. So, for example, a clear fingerprint can be compared to the defendant's fingerprints to yield a conclusive result; a blood sample, or a sample of body fluid which contains blood markers, can either completely exonerate or strongly implicate a defendant. As technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase. Current genetic testing measures, frequently used in civil paternity suits, are extraordinarily precise. See *Clark v. Jeter*, 486 U.S. 456, 465, 108 S.Ct. 1910, 1916, 100 L.Ed.2d 465 (1988). The importance of these types of evidence is indisputable, and requiring police to recognize their importance is not unreasonable.

The next inquiry is whether the evidence, which was obviously relevant and indicates an immutable characteristic of the actual assailant, is of a type likely to be independently exculpatory. Requiring the defendant to prove that the particular piece of evidence probably would be independently exculpatory***71** would require the defendant to prove the content of something he does not have because of the State's misconduct. Focusing on the *type* of evidence solves this problem. A court will be able to consider the type of evidence and the available technology, as well as the circumstances of the case, to determine the likelihood that the evidence might have proved to be exculpatory. The evidence must also be without equivalent in the particular case. It must not be cumu-

lative or collateral, cf. *United States v. Agurs*, 427 U.S., at 113–114, 96 S.Ct., at 2402–2403, and must bear directly on the question of innocence or guilt.

Due process must also take into account the burdens that the preservation of evidence places on the police. Law enforcement officers must be provided the option, as is implicit in *Trombetta*, of performing the proper tests on physical evidence and then discarding it.[FN7] Once a suspect has been arrested the police, after a reasonable time, may inform defense counsel of plans to discard the evidence. When the defense has been informed of the existence of the evidence, after a reasonable time the burden of preservation may shift to the defense. There should also be flexibility to deal with evidence that is unusually dangerous or difficult to store.

FN7. There is no need in this case to discuss whether the police have a duty to test evidence, or whether due process requires that police testing be on the "cutting edge" of technology. But uncertainty as to these questions only highlights the importance of preserving evidence, so that the defense has the opportunity at least to use whatever scientifically recognized tests are available. That is all that is at issue in this case.

III

Applying this standard to the facts of this case, I conclude that the Arizona Court of Appeals was correct in overturning respondent's conviction. The clothing worn by the victim contained samples of his assailant's semen. The appeals court found that these samples would probably be larger, less contaminated, and more likely to yield conclusive test results than would the samples collected by use of the assault kit. 153 Ariz. 50, 54, 734 P.2d 592, 596 (1986). The clothing*72 and the semen stains on the clothing therefore obviously were material.

Because semen is a body fluid which could have been tested by available methods to show an immutable characteristic of the assailant, there was a genuine possibility that the results of such testing might have exonerated respondent. The only evidence implicating respondent was the testimony**345 of the victim.[FN8] There was no other eyewitness, and the only other significant physical evidence, respondent's car, was seized by police, examined, turned over to a wrecking company, and then dismantled without the victim's having viewed it. The police also failed to check the car to confirm or refute elements of the victim's testimony.[FN9]

FN8. This Court "has recognized the inherently suspect qualities of eyewitness identification evidence." *Watkins v. Sowders*, 449 U.S. 341, 350, 101 S.Ct. 654, 659, 66 L.Ed.2d 549 (1981) (BRENNAN, J., dissenting). Such evidence is "notoriously unreliable," *ibid.*; see *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967); *Manson v. Brathwaite*, 432 U.S. 98, 111–112, 97 S.Ct. 2243, 2251–2252, 53 L.Ed.2d 140 (1977), and has distinct impacts on juries. "All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!' " E. Loftus, Eyewitness Testimony 19 (1979).

> Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults. See generally Cohen & Harnick, The Susceptibility of Child Witnesses to Suggestion, 4 Law and Human Behavior 201 (1980). Other studies show another element of possible relevance in this case: "Cross-racial identifications are much less likely to be accurate than same race identifications." Rahaim & Brodsky, Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy, 7 Law and Psych. Rev. 1, 2 (1982). These authorities suggest that eyewitness testimony alone, in the absence of corroboration, is to be viewed with some suspicion.

FN9. The victim testified that the car had a loud muffler, that country music was playing on its radio, and that the car was started using a key. Respondent and others testified that his car was inoperative on the night of the incident, that when it was working it ran quietly, that the radio did not work, and that the car could be started only by using a

screwdriver. The police did not check any of this before disposing of the car. See 153 Ariz. 50, 51–52, 734 P.2d 592, 593–594 (App.1986).

***73** Although a closer question, there was no equivalent evidence available to respondent. The swab contained a semen sample, but it was not sufficient to allow proper testing. Respondent had access to other evidence tending to show that he was not the assailant, but there was no other evidence that would have shown that it was physically impossible for respondent to have been the assailant. Nor would the preservation of the evidence here have been a burden upon the police. There obviously was refrigeration available, as the preservation of the swab indicates, and the items of clothing likely would not tax available storage space.

Considered in the context of the entire trial, the failure of the prosecution to preserve this evidence deprived respondent of a fair trial. It still remains "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (concurring opinion). The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law. Because the Court's opinion improperly limits the scope of due process, and ignores its proper focus in a futile pursuit of a bright-line rule, [FN10] I dissent.

FN10. Even under the standard articulated by the majority the proper resolution of this case should be a remand to consider whether the police did act in good faith. The Arizona Court of Appeals did not state in its opinion that there was no bad faith on the part of the police. Rather, it held that the proper standard to be applied was a consideration of whether the failure to preserve the evidence deprived respondent of a fair trial, and that, as a result, its holding did "not imply any bad faith on the part of the state." *Id.*, at 54, 734 P.2d, at 596. But there certainly is a sufficient basis on this record for a finding that the police acted in bad faith. The destruction of respondent's car by the police (which in itself may serve on remand as an alternative ground for finding a constitutional violation, see *id.*, at 55, 734 P.2d, at 597 (question left open)) certainly suggests that the police may have conducted their investigation with an improper animus. Although the majority provides no guidance as to how a lack of good faith is to be determined, or just how egregious police action must be, the police actions in this case raise a colorable claim of bad faith. If the Arizona courts on remand should determine that the failure to refrigerate the clothing was part of an overall investigation marred by bad faith, then, even under the majority's test, the conviction should be overturned.

U.S.Ariz.,1988.
Arizona v. Youngblood
488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281, 57 USLW 4013

END OF DOCUMENT

483 So.2d 768 (1986)

Lanzafane HENDRIETH, Appellant,

v.

STATE of Florida, Appellee.

No. BD-274.

District Court of Appeal of Florida, First District.

February 7, 1986.
Rehearing Denied March 19, 1986.

Michael Allen, Public Defender, Paula S. Saunders, Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen., Gary L. Printy, Asst. Atty. Gen., for appellee.

McCORD, GUYTE P., Jr. (Ret.), Associate Judge.

Hendrieth appeals from convictions for burglary of a conveyance and of a dwelling, and two counts of petit theft. He raises three points on appeal, only one of which merits discussion. We affirm.

Christopher Campbell, a resident of the victimized neighborhood, was interviewed by the police on the night of Hendrieth's arrest. He told them that he had seen two black men walking around the homes along his street, prompting him to call the police. This information was synopsized by the police in their report of the incident.

Campbell repeated his story at trial on direct examination by the State. He was not able to make an in-court identification of Hendrieth as one of the men he saw on the night of the crimes, but stated that he could have done so at that time. The State then called the officer who had interviewed Campbell and asked him to relate the information he had received, as reflected in the police report. The defense objected to the testimony as a prior consistent statement, impermissible because Campbell's direct testimony had not been impeached. The court allowed the officer to answer, ruling that the police report was "a more accurate statement" of Campbell's observations. The officer proceeded to testify, not that Campbell had identified Hendrieth, but that he had related seeing "two black men prowling around the neighborhood."

The admission of this testimony was error. Prior consistent statements are generally inadmissible absent a showing of recent fabrication or other reason for the witness's lack of credibility, *Demps v. State*, 462 So.2d 1074 (Fla. 1985), and the record reflects no impeachment whatever of Campbell's direct testimony.

Prior consistent statements may also be admissible under certain exceptions to the hearsay rule, Ehrhardt, *Florida Evidence,* 2d ed., § 801.8, but no exception is applicable in this case. Section 90.803(5), Florida Statutes (1983), provides that "a memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made by the witness when the matter was fresh in his memory and to reflect that knowledge correctly" is not hearsay. The report from which the officer testified as to what Campbell told him was not "made by the witness," however, but was a synopsis made by the officer. Police reports themselves are specifically excluded from the exception for public records and reports, Section 90.803(8), Florida Statutes (1983).

The State next argues that the police may testify to an out-of-court identification when a witness is unable to do so, citing *State v. Freber*, 366 So.2d 426 (Fla. 1978). However, the officer's testimony herein did not reflect an on-the-scene identification by Campbell, but merely echoed his direct testimony that he saw "two black men" in the neighborhood. Therefore, Freber does not operate to validate the testimony.

The proper inquiry in the face of this error is whether, but for it, it is likely that the result below would have been different. *Teffeteller v. State*, 439 So.2d 840, 843 (Fla. 1983) citing *Palmes v. State*, 397 So.2d 648, 653 (Fla.) cert. den. 454 U.S. 882, 102 S.Ct. 369, 70

L.Ed.2d 195 (1981). If the impermissible testimony is eliminated, Campbell's identical, unobjectionable testimony remains. Further, evidence was presented that Hendrieth was apprehended on the street where the crimes occurred, almost immediately following Campbell's summons of the police, in the possession of the items identified by the victims as missing. Therefore, we find that without the erroneous admission of the officer's testimony, the result would not have been different and the error was harmless.

AFFIRMED.

ERVIN and WIGGINTON, JJ., concur.

17 Fla. L. Weekly Supp. 904a

Online Reference: FLWSUPP 1710KROM

Criminal law -- Driving under influence -- Possession of cannabis and paraphernalia -- Evidence -- Hearsay -- Past recollection recorded -- Police officer may offer testimony from probable cause affidavit as past recollection recorded provided proper predicate is laid and report is not received into evidence as exhibit unless offered by defendant -- No merit to argument that appellate court should dismiss appeal or affirm order granting motion to preclude reading of affidavit into record because initial brief incorrectly referred to appealed ruling as order granting motion to suppress where all parties involved knew which ruling was subject of appeal

STATE OF FLORIDA, Appellant, v. MICHAEL KROMKE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 07-151AC10A. L.T. No. 06-25144MM10A. April 29, 2010. Leonard Feiner, Judge. Counsel: Susan Odzer Hugentugler, Assistant State Attorney, Ft. Lauderdale. Jason T. Forman, Ft. Lauderdale.

OPINION OF THE COURT

(TOWBIN-SINGER, J.) THIS CAUSE comes before the Court, sitting in its appellate capacity, upon Appellant's timely appeal of the trial court's order granting Appellee's Motion to Preclude Having Probable Cause Affidavit Read into Record as a Past Recollection Recorded. (R. at 31). Having considered the briefs of both parties, the trial court record, and applicable law, this Court finds as follows:

Appellee was charged by information with possession of cannabis, possession of drug paraphernalia, and one count of driving under the influence, contrary to subsections 316.193(1) and 316.1934(1) of the Florida Statutes. Appellee was further charged through uniform traffic citation with failure to maintain a single lane. The offenses were alleged to have been committed on December 9, 2006.

On July 5, 2007 Appellee filed his "Motion to Suppress Evidence Obtained as a Result of an Unlawful Arrest." A hearing on the motion was held August 2, 2007. At the hearing, Broward Sherriff's Office Deputy Joshua Passman testified as to the circumstances that led to Appellee's arrest. When questioned, Deputy Passman did not have an independent recollection as to how Appellee performed various field sobriety exercises. Further, Deputy Passman's memory was not adequately refreshed after viewing the probable cause affidavit he drafted following the incident.

The prosecutor sought to have Deputy Passman read from his probable cause affidavit under the past recollection recorded exception to the hearsay rule found in subsection 90.803(5) of the Florida Statutes. Defense counsel objected. Citing subsection 90.803(8) of the Florida Statutes, defense counsel argued that police reports are not public records that may be admitted into evidence, and a violation of *Crawford v. Washington* would result because he would not be able to properly cross examine Deputy Passman as to the events contained in the report. 541 U.S. 36 (2004). Relying on *State v. Donner*, the trial court issued a written order precluding Deputy Passman from reading his probable cause affidavit into the record as a past recollection recorded. 11 Fla. L. Weekly Supp. 976b (Fla. 17th Cir. Ct. 2004); (R. 31).

In the instant appeal, appellant contends the trial court erred in its ruling because the prosecutor was not offering the police report into evidence under the public record exception to the hearsay rule, but was offering the officer's testimony from the report as a past recollection recorded. Appellant claims such testimony is admissible without introducing the report itself as is prohibited under section 90.803 of the Florida Statutes. Appellee argues police reports are not allowed to be admitted into evidence under any circumstances in a criminal case and the proper argument on appeal was not raised in Appellant's brief. For the reasons stated below, this Court finds a police officer may offer testimony from a police report as a past recollection recorded provided the proper predicate is laid and the report is not received into evidence as an exhibit unless offered by an adverse party.

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008). "That discretion, however, is limited by the rules of evidence." *Id.*

Section 90.803 of the Florida Statutes provides the following exceptions to the general prohibition of hearsay evidence:

> *Recorded recollection.* -- A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.
>
> Fla. Stat. § 90.803(5).
>
> *Public records and reports.* -- Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under *s. 316.1934* or *s. 327.354*.
>
> Fla. Stat. § 90.803(8).

Although subsection 90.803(8) of the Florida Statutes specifically excludes police reports from the public records and reports hearsay exception, no such exclusion is found in the recorded recollection hearsay exception contained in subsection 90.803(5). Further, there is no language in the public records and reports exception found in subsection 90.803(8) that indicates the exclusion of matters observed by a police officer should be applied to the entire statute. Allowing an officer to read from his or her report while testifying as a past recollection recorded after the proper predicate is laid is consistent with both subsections 90.803(5) and 90.803(8) provided the report is not received into evidence as an exhibit.

Moreover, the clear implication of *K.E.A. v. State* is that an officer may read from a police report as a past recollection recorded under subsection 90.803(5) of the Florida Statutes. 802 So. 2d 410 (Fla. 3d DCA 2001). In *K.E.A.*, the State's sole witness at a juvenile's adjudicatory hearing was a Miami Beach Police Officer. When the officer did not initially remember the arrest that led to the hearing, he was shown the arrest form from the incident to refresh his recollection. Because the officer's memory was not refreshed, the Third District Court of Appeal found his testimony could not form the basis of the juvenile's adjudication of delinquency.

However, the Third District Court of Appeal went on to explain, "Moreover, the State never offered to read the officer's arrest form as past recollection recorded, under section 90.803(5), Florida Statutes (1999), an exception to the hearsay rule." *Id.* at 411-12. This Court can find no reason why the Third District Court of Appeal would comment on the State's failure to have the officer read his arrest form as a past recollection recorded if such an action were completely forbidden as Appellee contends.

The Third District Court of Appeal additionally opined, "Even if the State had offered the evidence as past recollection recorded, the State failed to lay the predicate to qualify the evidence under that section." *Id.* at 412 n.2. This statement further illustrates the officer would have been able to read from his report as a past recollection recorded if the proper predicate had been laid. Similar to the Third District's previous statement, this analysis would not make sense if officers were completely forbidden from reading from police reports as Appellee contends.

Deputy Passman's testimony would not result in a violation of the Confrontation Clause. "[W]hen the declarant appears

for cross examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, at 59 n.9. "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* "[T]he Constitution only guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." A.E.B. v. State, 818 So. 2d 534, 536 (Fla. 2d DCA 2002) *citing United States v. Owens*, 484 U.S. 554, 559 (1988); *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987).

In the instant case Deputy Passman appeared for cross examination at the hearing. Therefore the Confrontation Clause placed no constraints on the use of his prior testimonial statements. Defense Counsel was free to force Deputy Passman to defend or explain testimony from his probable cause affidavit through cross examination. Defense counsel argued at the hearing he did not believe Deputy Passman would be able to provide adequate responses to such a cross examination. *See* (Tr. vol. 2, 25-26). Counsel's concerns provide no basis for excluding the evidence because counsel is not entitled to cross examination that is effective to the extent he may wish.

Appellee contends this Court should dismiss or affirm the instant appeal because the proper argument on appeal was not raised in Appellant's initial brief. Although Appellant's Notice of Appeal cites the trial court's "Order Granting Defendant's Motion to Preclude Having Police Affidavit Read into Record as Past Recollection Recorded in the above-styled cause, rendered 10/02/2007," Appellant's initial brief incorrectly refers to the ruling as an order granting Defendant's motion to suppress. *See* (R. at 32; Appellant's Br. 8-10, 26). This Court is not persuaded by Appellee's argument.

Appellant's use of "motion to suppress" did not create confusion as to the issue on appeal or raise claim not presented in the notice of appeal. After reviewing the record, transcripts and briefs of both parties, it is clear all parties involved knew precisely which trial court ruling was the subject of the instant appeal. Appellant's brief makes clear it is the order preventing the deputy's report from being read into evidence as a past recollection that is being appealed. *See* (Appellant's Br. i, 8, 10). Further, Appellant's brief cites to the appropriate portions of the transcript and even cites directly to the trial court's written order granting the Defense Motion to Preclude Having Probable Cause Affidavit Read Into Record as a Past Recollection Recorded. *See* (Appellant's Br. 7) *citing* (R. at 31; Tr. vol. 3, 10).

This Court is aware its decision conflicts with *State v. Donner, supra.* Although the *Donner* decision is persuasive, this Court is bound by subsection 90.803 (5) of the Florida Statutes and the Third District's decision in *K.E.A. v. State, supra.* Accordingly, it is

ORDERED AND ADJUDGED that the trial court's order granting Defendant/Appellee's Motion to Preclude Having Probable Cause Affidavit Read into Record as a Past Recollection Recorded is hereby REVERSED and this cause is REMANDED for further proceedings consistent with this opinion.

* * *

758 So.2d 110 (2000)

STATE of Florida, Petitioner,

v.

Chris KALOGEROPOLOUS, Respondent.

No. SC95664.

Supreme Court of Florida.

May 11, 2000.

Robert A. Butterworth, Attorney General, Celia Terenzio, Bureau Chief, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, Florida, for Petitioner.

Richard L. Jorandby, Public Defender, and Ellen Griffin, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for Respondent.

WELLS, J.

We have for review *State v. Kalogeropoulos*, 735 So.2d 507 (Fla. 4th DCA 1999), which certified conflict with the opinion in *Branciforte v. State*, 678 So.2d 426 (Fla. 2d DCA 1996), and *State v. Blanco*, 432 So.2d 633 (Fla. 3d DCA 1983). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed, we approve the decision of the Fourth District Court of Appeal.

Respondent Chris Kalogeropoulos was a defendant in a vehicular homicide case. Respondent moved to dismiss the case. In the motion, respondent detailed a great number of the facts surrounding the accident and alleged that there were no material disputed facts. In response, the State's traverse generally denied that there were no material disputed facts, denied in part and admitted in part the paragraph containing the recitation of facts, and stated that "there are additional facts omitted by the defendant." The trial court granted respondent's motion to dismiss.

On appeal, the State argued that its traverse was legally sufficient and required the denial of the motion to dismiss under *Branciforte* and *Blanco*. In *Branciforte* and *Blanco*, the State filed a traverse stating that "the state specifically denies that the material facts as presented in the defendant's sworn motion to dismiss are the only facts upon which the state would rely during the state's case in chief." *Branciforte*, 678 So.2d at 427; *Blanco*, 432 So.2d at 634. Courts in each case found this statement sufficient to defeat a motion to dismiss.

The Fourth District recognized that *Branciforte* and *Blanco* supported the State's position but found that those cases were incorrectly decided because they ignored the language of Florida Rule of Criminal Procedure 3.190(d). The Fourth District affirmed the trial court's granting of the defendant's motion to dismiss and certified conflict with *Branciforte* and *Blanco*. *Kalogeropoulos*, 735 So.2d at 508-509.

We agree with the Fourth District in concluding that more is required to defeat a motion to dismiss. Pursuant to rule 3.190(c)(4), a defendant may move for dismissal alleging in the motion that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." Under this rule it is the defendant's burden to specifically allege and swear to the undisputed facts in a motion to dismiss and to demonstrate that no prima facie case exists upon the facts set forth in detail in the motion. The purpose of this procedure is to avoid a trial when there are no material facts genuinely in issue. *See State v. Davis*, 243 So.2d 587, 591 (Fla.1971). The procedure is similar to summary judgment proceedings in civil cases, but a dismissal under this rule is not a bar to subsequent prosecutions. *See Dorelus v. State*, 747 So.2d 368 (Fla.1999); Fla. R.Crim. P. 3.190 (Committee Notes 1968 Adoption).

In order for the State to defeat a motion to dismiss, rule 3.190(d) provides in part:

> The state may traverse or demur to a motion to dismiss that alleges factual matters. Factual matters alleged in a motion to dismiss under subdivision (c)(4) of this rule shall be deemed admitted unless *specifically* denied by the state in the traverse.... A motion to dismiss under subdivision (c)(4) of this rule shall be denied if the state files a traverse that *with specificity* denies under oath the material fact or facts alleged in the motion to dismiss.

Fla. R.Crim. P. 3.190(d) (emphasis added). As the Fourth District noted, the "with specificity" language was added to the rule to clarify that the State was required to file a specific traverse to "specific material fact or facts" in order to defeat a motion to dismiss. *See Florida Bar re Florida Rules of Criminal Procedure*, 343 So.2d 1247, 1255-56 (Fla.1977). If the facts in the motion that the State does not specifically deny support the defendant's position but additional facts exist that would create a material issue preventing the granting of the motion, the State should set forth those additional facts in the traverse just as a non-movant would have to do in a counter-affidavit in order to defeat a motion for summary judgment. *See* Landers v. Milton, 370 So.2d 368 (Fla.1979); *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So.2d 786 (Fla. 4th DCA 1995).

The State suggests that holding that the State must specifically allege the facts it is relying on when claiming the additional facts support a prima facie case would encourage defendants to set forth incomplete facts and require the State to disclose all of the facts and theory upon which it will rely to prosecute the case. That is not what is required. The State need only specifically dispute a material fact alleged by the defendant or add additional material facts that meet the minimal requirement of a prima facie case. If a material fact is disputed, denial of the motion to dismiss is mandatory. *See* Boler v. State, 678 So.2d 319, 323 (Fla.1996). In meeting its burden of establishing a prima facie case, the State can use circumstantial evidence, and all inferences made are resolved in its favor. *Id.*

Accordingly, we approve the decision of the Fourth District Court of Appeal.

It is so ordered.

HARDING, C.J., and SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

555 So.2d 888 (1990)

STATE of Florida, Appellant,

v.

Nicholas Patrick POWERS, Warren A. Stevens and Linda J. Schoeppl, Appellees.

No. 89-01025.

District Court of Appeal of Florida, Second District.

January 5, 1990.
Rehearing Denied January 24, 1990.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Stephen A. Baker, Asst. Atty. Gen., Tampa, for appellant.

Denis M. de Vlaming and William C. Gregg, III, Clearwater, for appellees.

SCHOONOVER, Acting Chief Judge.

The state has appealed three orders entered by the county court in and for Pinellas County, Florida. We have accepted jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(4)(A) and 9.160(e)(2). After reviewing the briefs, record on appeal, and hearing oral argument, we conclude that the trial court erred by dismissing the charges against the appellees, Nicholas Patrick Powers, Warren A. Stevens, and Linda J. Schoeppl and. accordingly, reverse.

The appellees were arrested by the Pinellas County Sheriff's Department and charged with driving under the influence (DUI) in violation of section 316.193, Florida Statutes (1987). The appellees filed motions to dismiss the charges filed against them. The motions alleged that the appellees' due process rights were violated because the sheriff's department did not video tape the field sobriety tests conducted at the time of arrest and later at the place of incarceration.

At the hearing on the motions, two of the appellees testified that they performed the tests better than the written reports indicated, and they felt that a video tape would support their position. The parties stipulated that the third appellee would testify the same way. In addition to the testimony of the appellees and the alcoholic influence report forms prepared by the arresting officers, Sergeant Lonnie Hill, supervisor of the DUI squad, testified and laid the predicate for the introduction of a memorandum that he had prepared at the request of his immediate supervisor. On the date of the hearing, February 17, 1989, Hill had been employed by the sheriff's department for approximately seven years. During that period of time, the department had never video taped drivers performing field sobriety tests. During the month of June 1988, Hill, at the request of his supervisor, prepared a memorandum concerning the use of video tapes in the prosecution of DUI offenses. The memorandum stated, among other things, that Hill had received information that video taping did not help the prosecution of DUI offenses, but instead favored the driver when a driver had a blood alcohol reading just over that needed to establish a presumption of impairment. In Hill's opinion, a deputy's observation of an accused's performance of the field sobriety test was the best evidence of the performance and the testing procedures should not be video taped. There was no evidence presented to establish that the sheriff's policy of not video taping field sobriety tests was based upon this memorandum or upon Hill's opinion. At the conclusion of the hearing, the trial court granted the appellees' motion to dismiss.

In a very thorough order, the court concluded that law enforcement's demonstrated bad faith in intentionally failing to preserve potentially exculpatory evidence of the appellees' successful performance of the field sobriety tests constituted a denial of due process sufficient to warrant dismissal of the charges. The state filed a timely notice of appeal from that order dismissing the charges, and pursuant to the trial court's request, we accepted jurisdiction of the consolidated appeals.

Under the circumstances of this case, we agree with the state that the appellees' due process rights were not violated by the sheriff's department not video taping the appellees' performance during field sobriety testing.

I.

Based upon the record presented to us, if the appellees' performances had been video taped and the tape had not been preserved, we would affirm the trial court's dismissal of the charges filed against the appellees without having to consider the good or bad faith of the sheriff's department. An accused's due process rights are violated, irrespective of the good or bad faith of the prosecution, if the prosecution suppresses material evidence favorable to the accused. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Although an accused's due process rights are not violated if the contents of a lost or destroyed tape recording would not have been beneficial to the accused, thus demonstrating a lack of prejudice, the state has the burden of showing the absence of prejudice. *State v. Sobel*, 363 So.2d 324 (Fla. 1978). In this case, the record reflects that each of the appellees presented evidence indicating that the tapes would be material in that they would impeach the field sobriety test reports and the testimony of the arresting and backup officers. Accordingly, the loss or destruction of the tape, if it had been made, would have prejudiced the appellees and resulted in a violation of their due process rights, and we would affirm the trial court. *Sobel.*

In this case, the trial court concluded that law enforcement's demonstrated bad faith in intentionally failing to preserve potentially exculpatory evidence of appellees' successful performance on field sobriety tests constituted a denial of due process sufficient to warrant dismissal of the charges. We disagree. In a case where the destruction of evidence is a flagrant and deliberate act done in bad faith with the intention of prejudicing the defense, that alone would be sufficient to warrant a dismissal of the charges against the appellees. *See Strahorn v. State*, 436 So.2d 447 (Fla. 2d DCA 1983). In its order, the trial court found that the decision not to video tape field sobriety testing was a conscious policy decision that was made and approved by the sheriff based upon information and advice received from his subordinates through written memorandum. The court then referred to Hill's memorandum on June 22, 1988, and found it could be considered as having formed the basis for the sheriff's decision not to video tape field sobriety tests. The record lacks any evidence that the policy of not video taping had anything to do with this memorandum. The sheriff's department, then under the direction of Sheriff Coleman, established a policy of not video taping performance tests approximately seven years prior to Hill's memorandum recommending that the department refrain from doing so. Absent any evidence that the policy was not initiated in good faith, we will not impute a finding of bad faith based upon the opinion of one deputy given to a subordinate to the sheriff seven years later. We must instead conclude that the policy was instituted for reasons in good faith and that the deputies were operating under that continued policy when they did not video tape the appellees' field sobriety test performances. *See Alsop v. Pierce*, 155 Fla. 185, 19 So.2d 799 (1944).

II.

In this case, however, we are not dealing with a video tape that was lost or destroyed, but instead with a video tape that was never created. We agree that there is no material difference between the destruction of evidence by the state's affirmative act and its destruction by the state's failure to act where it has a ready means of preserving the evidence with a minimum of inconvenience. *State v. Hills*, 467 So.2d 845 (Fla. 4th DCA 1985). The issue before us, however, is not the failure to preserve evidence, but the failure to gather and preserve evidence in a particular manner. If we were to require the state in every case, in its investigation of a crime, to leave no stone unturned and preserve the evidence obtained in a manner satisfactorily only to the accused, it would shift the line of fairness between the rights of an accused and the rights of society totally to one side. *State v. Wells*, 103 Idaho 137, 645 P.2d 371 (Ct.App. 1982).

Law enforcement does not have a constitutional duty to perform any particular tests. *Arizona v. Youngblood*, 488 U.S. ___, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Certain duties arise, however, once a policy of gathering evidence through certain tests is established. Once law enforcement has gathered and taken possession of evidence, a duty of preservation in some form attaches. *Budman v. State*, 362 So.2d 1022 (Fla. 3d DCA 1978).

The Pinellas County Sheriff's Department chose to perform two particular tests in connection with its prosecution of DUI cases. First, by collecting a sample of an accused's breath and performing a test on that breath, the department was able to determine the percentage of alcohol in an accused's blood. Although the appellees who took intoxilyzer tests in this case did not attack those tests, the principles established in connection with that type of test control our decision in this matter. Unless a criminal defendant can show bad faith on the part of law enforcement, the state's failure to preserve potentially useful evidence of which no more can be said that it could have been subjected to tests, the results of which might have exonerated the defendant, does not constitute a violation of the due

process clause. *Youngblood.* Accordingly, the due process clause does not require law enforcement agencies to preserve breath samples of suspected drunken drivers in order for the results of breath analysis tests to be admissible in criminal prosecutions. *California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). The policy of not preserving breath samples is without constitutional defect. *Trombetta.* Whatever duty law enforcement has to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. If there is no indication that law enforcement fails to preserve a sample of breath in bad faith, and the accused has sufficient opportunity to question the results of the tests, the state is not obligated to take affirmative steps to preserve a blood or breath sample. *See Trombetta; Houser v. State,* 474 So.2d 1193 (Fla. 1985). *See also State v. Garafola,* 459 So.2d 1066 (Fla. 4th DCA 1984); *State v. Plawchan,* 453 So.2d 496 (Fla. 1st DCA 1984).

We turn now to the second test conducted by the Pinellas County Sheriff's Department, i.e., the field sobriety test. Applying the principles discussed herein, we find that the appellees' due process rights were not violated when that agency followed its long standing policy of not video taping the performance of field sobriety tests.

First, as already discussed, we reject the appellees' contention that the trial court correctly held that this policy was adopted in bad faith and that charges should, therefore, be dismissed pursuant to *Youngblood* and *Houser.* Once again, we will not impute bad faith to the sheriff's department because other agencies have a different policy and one member of a large staff, even for some improper reasons, recommended that the policy be continued more than seven years after it was established. Absent any evidence to the contrary, we must assume that the policy was established in good faith. *Alsop.*

The law enforcement agency did not refuse to preserve the evidence they intended to introduce at appellees' trial, i.e., the results of the field sobriety tests, they just did not preserve it in the manner desired by the appellees. Whatever duty the sheriff's department had to preserve the field sobriety tests other than by the means used is limited to material matter, i.e., the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Trombetta.* In this case, even if we assume that the tape might have been exculpatory if the state had video taped the appellees' performance and that there is evidence to support this assumption, it does not follow that the appellees do not have alternate means to defend against the test results. There has been no showing or indication that the officers improperly conducted the tests, and the appellees retain the right to cross-examine the officers who witnessed the tests and to present other evidence concerning the reliability of the tests.

Since there is no sufficient indication that the sheriff's department, in bad faith, failed to preserve the results of the appellees' performance of the field sobriety tests and the department was following an established policy, and the appellees had sufficient opportunity to question the results of the tests, the Pinellas County Sheriff's Department did not violate the appellees' due process rights by not video taping their field sobriety tests performances. *See Trombetta; Houser; Garafola; Plawchan. See also Turner v. State, Dep't of Motor Vehicles,* 14 Wash. App. 333, 541 P.2d 1005 (1975).

Reversed and remanded for further proceedings consistent herewith.

FRANK and PARKER, JJ., concur.

14 So.3d 1130 (2009)

STATE of Florida, Appellant,

v.

James DAVIS, Appellee.

No. 4D08-1216.

District Court of Appeal of Florida, Fourth District.

June 17, 2009.

Bill McCollum, Attorney General, Tallahassee, and Mitchell A. Egber, Assistant Attorney General, West Palm Beach, for appellant.

Carey Haughwout, Public Defender, and John M. Conway, Assistant Public Defender, West Palm Beach, for appellee.

STEVENSON, J.

This is an appeal by the State of an order dismissing a felony DUI charge against defendant James Davis. The dismissal was entered as a sanction for the State's loss of the video recording of Davis's performance of roadside sobriety tests. Finding that dismissal was too harsh under the circumstances present here, we reverse and remand for further proceedings.

The defendant was stopped at a DUI checkpoint in Pembroke Pines. The probable cause affidavit reflects that Officer Charles Herring of the Pembroke Pines Police Department observed the following: the smell of alcohol on the defendant's breath; the defendant's eyes were bloodshot and his face flushed; the defendant's speech was slurred and his movements slow and deliberate; and the defendant had difficulty retrieving his wallet. The probable cause affidavit also indicates that the defendant admitted to consuming two beers and that he was taking oxycodone. As a result, Officer Herring asked the defendant to perform roadside sobriety tests. These roadside sobriety tests were recorded by the digital video camera in the officer's car. The defendant refused to submit to a breathalyzer.

When the State failed to provide the defense with a copy of the video recording of the roadside sobriety tests, the defendant filed a motion to compel its production, which was granted. When the State still failed to provide the defense with a copy of the video, the defendant filed a motion seeking dismissal of the felony DUI. At a subsequent evidentiary hearing on the motion, the officer testified that the defendant's roadside sobriety test had accurately been recorded to the system's hard drive, but that for reasons he could not explain, the recording was lost during the transfer of the recording from the hard drive to a DVD. The officer insisted that he had viewed the recording during his attempt to transfer it to the DVD, it was consistent with his testimony and it demonstrated that the defendant was impaired. The defendant took the position that the recording would have impeached the officer's testimony that he was impaired and would have been helpful to the defendant. With this evidence before it, the trial court concluded that, while there was no bad faith on the part of the police surrounding the loss of the recording, due process concerns required the dismissal of the felony DUI charge as the defendant was prejudiced by the loss of the evidence "since there exists no comparable evidence."

Where lost or unpreserved evidence is "material exculpatory evidence," the loss of such evidence is a violation of the defendant's due process rights and the good or bad faith of the State is irrelevant. State v. Muro, 909 So.2d 448, 452 (Fla. 4th DCA 2005); *see also* Kelley v. State, 486 So.2d 578, 581 (Fla.1986) ("'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.'" (quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963))). Lost or unpreserved evidence is "material" in this sense "if the omitted evidence creates a reasonable doubt that did not otherwise exist." State v. Sobel, 363 So.2d 324, 327 (Fla.1978) (citing United States v. Agurs, 427 U.S. 97, 109, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

In the instant case, we find no error in the trial court's conclusion that the lost video of the defendant's roadside sobriety tests was "material" and that the defendant was prejudiced by the tape's loss. The defendant refused to take a breathalyzer and, consequently, whether he was driving while under the influence must be determined by resort to whether he demonstrated physical signs of impairment. An evaluation of an individual's impairment is necessarily somewhat subjective and the tape would have provided a jury with

the opportunity to assess for itself whether the defendant was impaired. The significance of a tape of a DUI stop vis-à-vis the testimony of the officer and the defendant was addressed by the Oregon appellate court in *State v. Zinsli*, 156 Or. App. 245, 966 P.2d 1200 (1998):

> In general, the prosecution of a DUII [driving under the influence of intoxicants] case depends heavily on the opinion of the arresting officer in determining whether a defendant's "mental or physical faculties were adversely affected... to a noticeable or perceptible degree." *State v. Gaylor*, 19 Or.App. 154, 163-64, 527 P.2d 4 (1974). Here, in the absence of the videotape, a jury would have only ... [the arresting officer's] interpretation of defendant's performance of the FSTs [field sobriety tests], demeanor, appearance and speech patterns, which, as noted, were to some extent not noticeably affected by alcohol. Of course, defendant may, but does not have to, offer his own version of the events to rebut [the arresting officer's] conclusions and the Intoxilyzer results. However, defendant's testimony is not an acceptable substitute, because defendant's testimony carries the risk that the jury will view that testimony as extraordinarily self-serving, whereas that risk is not present in the videotape evidence. Accordingly, the videotape evidence is unique because it would provide defendant with an objective video replay of the events from which a jury could draw its own conclusions.

Id. at 1205 (emphasis omitted).

This, then, brings us to the sanction imposed—dismissal. The State's loss of material exculpatory evidence need not always result in dismissal of the criminal charge. *See* *Lancaster v. State*, 457 So.2d 1133, 506 (Fla. 4th DCA 1984) (holding defendant's due process rights were violated by loss of burned vehicle underlying an arson charge, reversing conviction, and remanding with instructions that defendant be retried, but that, at retrial, State was barred from calling as witnesses the experts who had examined the truck); *State v. Herrera*, 365 So.2d 399, 401 (Fla. 3d DCA 1978) (noting that "state's intentional or negligent suppression of material evidence favorable to the defendant ... constitutes a denial of due process" and "may call for a new trial, the exclusion of certain of the state's evidence at trial, or the dismissal of the prosecution against the defendant"). And, while it is true that a trial court's choice of sanction is to be reviewed on appeal for an abuse of discretion, dismissal of a charge is "an extreme sanction that should be used with caution" and should be limited to "cases where no other sanction can remedy the prejudice to the defendant," *see* *State v. Carpenter*, 899 So.2d 1176, 1182 (Fla. 3d DCA 2005). That is not the case here and, consequently, we hold that dismissal of the charge was too harsh a sanction.

In so holding, we are aware of the decision in *State v. Powers*, 555 So.2d 888 (Fla. 2d DCA 1990). There, the police had failed to record the defendants' field sobriety tests. The defendants claimed that the failure to record the sobriety tests required dismissal of the DUI charges as the police should have recorded the sobriety tests and their failure to do so was the product of bad faith, i.e., a belief that recording field sobriety tests did not help in prosecuting DUIs and was, in fact, favorable to the defense. The county court dismissed the charges. The Second District reversed, holding that dismissal was not required as the police had no duty to record the sobriety tests. The court then went further, stating that, had the field sobriety tests been recorded and the recordings not been preserved, it would have affirmed the dismissals as such evidence was "material" and its loss was a violation of the defendants' due process rights regardless of any bad faith on the part of the State. In so concluding, the court wrote that the defendants had presented evidence indicating that the tapes would have impeached the field sobriety test reports and the testimony of the officers. The nature of this evidence is not, however, apparent from the opinion. The Second District's statements regarding the propriety of dismissal in the face of unpreserved field sobriety tests are dicta and nothing in the opinion indicates that the court considered whether lesser sanctions would have sufficed.

The State suggests that an appropriate lesser sanction is to simply try the case without informing the jury that the tape existed. We agree with the defendant, however, that this provides the defendant no remedy at all for the loss of the tape. There are, however, other possibilities. One is for the trial court to preclude the State from utilizing the roadside sobriety tests. *See* *Lancaster*, 457 So.2d at 506. Another possibility would be instructing the jury that they may infer that the lost evidence is exculpatory. *See, e.g.*, *State v. Leslie*, 147 Ariz. 38, 708 P.2d 719, 728 (1985) (en banc) (stating that defendant is entitled to have the jury instructed that it "may infer that the true fact is against the interest of the state" where the state fails to preserve material evidence that may have exonerated the defendant) (citation omitted); *Deberry v. State*, 457 A.2d 744, 754 (Del.1983) (requiring State to stipulate on retrial that if defendant's clothing, lost by the State, were introduced, it would not contain any evidence incriminating him). Such an instruction would be akin to the 1134 so-called *Valcin*[1] instruction given in Florida civil cases. *See, e.g.*, *Am. Hospitality Mgmt. Co. of Minn. v. Hettiger*, 904 So.2d 547, 551 (Fla. 4th DCA 2005).

Having concluded that dismissal was too harsh a sanction, we reverse the order dismissing the felony DUI charge and remand the case to the trial court with instructions that it consider a sanction short of dismissal to address the loss of the tape. We leave it to the trial court to determine what lesser sanction is appropriate.

Reversed and Remanded.

HAZOURI and LEVINE, JJ., concur.

[1] *Pub. Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla.1987).

Summary table of most of the errors that affect breath alcohol results, qualitatively and quantitatively.

Variable	Comments	Effects on Breath alcohol concentration
Blood Breath Ratio	2100:1 used Range is 700:1 to 3300:1	Blood Breath Ratio always overestimates during the absorption phase, up to 100%
Retrograde Extrapolation	Must know drinking history Must know elimination rate	Error may be 0.15 g/dl per hour
Mouth Alcohol	Must know dental history	May produce results up to 0.60 g/210 liter

Interfering Compounds	Experimentally proven	
	All compounds tested at concentrations found in live humans	
Examples include:		
isopropanol	Diabetes, starvation, liver disease	These compounds
acetone	Diabetes, starvation, liver disease	alone can give a breath result of
m-xylene, o-xylene	Workplace exposure	0.08 g/210 liter
methyl ethyl ketone	Workplace exposure	
methanol	Workplace exposure	They all add to an ethanol result
toluene	Workplace exposure	
acetaldehyde	Ethanol consumption	

Body Temperature	Body temperature may vary 3 degrees centigrade	Increases breath result 8 % per degree, up to 24% increase
Breathing	Breath holding	14% above the true BAC
Blood Water Content	Anemia	6.4% increase above corrected BAC
GERD	Very common	May increase breath 100 %
Gross Errors and Random Errors	Positive and Negative controls must be run with every breath sample	Never done ; error an be the entire result

Stefan Rose, M.D., University Medical and Forensic Consultants, Inc., 10130 Northlake Boulevard Suite 214, # 300, West Palm Beach, Florida 33412 Phone 561-795-4452 (email) toxdoc@umfc.net

305 So.2d 804
(Cite as: 305 So.2d 804)

C

District Court of Appeal of Florida, Fourth District.
STATE of Florida, Appellant,
v.
Michael Lee HINTON, Appellee.

No. 74—340.
Jan. 10, 1975.

State appealed from order of the Circuit Court, Orange County, Peter M. deManio, J., suppressing evidence alleged to have been illegally seized. The District Court of Appeal, Mager, J., held that defendant's burden or proving that search was invalid was initially met by court's judicially noticing that its own file contained no warrant and burden then shifted to State to sustain validity of the search; that when defendant demonstrated warrantless arrest and search, but State failed to prove legal search, defendant was entitled to have evidence suppressed.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿392.49(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(1) k. In general. Most Cited Cases
(Formerly 110k394.6(4))

Motion to suppress evidence and allegations therein are not "evidence" within rule requiring that defendant on hearing of motion shall present evidence supporting his position. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(h), (h)(2, 3).

[2] Criminal Law 110 ⚿392.49(4)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(3) Weight and Sufficiency
110k392.49(4) k. In general. Most Cited Cases
(Formerly 110k394.6(4))

If motion to suppress evidence asserts a fact issue which is reflected in and can be resolved by an inspection of court file, such assertion by defendant may, under certain limited circumstances, constitute "evidence supporting his position" within statutes requiring that on hearing on motion defendant produce such evidence. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(h)(3).

[3] Criminal Law 110 ⚿304(16)

110 Criminal Law
110XVII Evidence
110XVII(A) Judicial Notice
110k304 Judicial Notice
110k304(16) k. Records. Most Cited Cases

Criminal Law 110 ⚿392.49(7)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(3) Weight and Sufficiency
110k392.49(7) k. Warrant requirements; probable cause. Most Cited Cases
(Formerly 110k394.6(4))

On motion to suppress evidence based on asserted absence of warrant for seizure, court may take judicial notice of its own files and records in case pending before it to determine existence vel

non of such warrant and court's ascertaining that file contains no warrant is evidence supporting defendant's position, just as if direct testimony had been introduced. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(h)(2, 3).

[4] Criminal Law 110 ⚿392.49(2)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(2) k. Presumptions and burden of proof. Most Cited Cases
(Formerly 110k394.6(4))

Criminal Law 110 ⚿392.49(7)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(3) Weight and Sufficiency
110k392.49(7) k. Warrant requirements; probable cause. Most Cited Cases
(Formerly 110k394.6(4))

On motion to suppress evidence, defendant's burden of proving that search was invalid was initially met by court's judicially noticing that its own file contained no warrant and burden then shifted to state to sustain validity of the search. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(h)(2, 3).

[5] Criminal Law 110 ⚿392.49(4)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(3) Weight and Sufficiency
110k392.49(4) k. In general. Most Cited Cases
(Formerly 110k394.6(4))

Prima facie showing of invalidity of search may be made by motion supported by evidence which court may judicially notice and it is not essential for defendant to introduce testimonial or documentary evidence with respect to existence vel non of warrant in court file, although better practice may suggest affidavit by court officer to that effect. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(h)(2, 3).

[6] Criminal Law 110 ⚿392.49(2)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(2) k. Presumptions and burden of proof. Most Cited Cases
(Formerly 110k394.4(9))

When defendant demonstrated warrantless arrest and search, thereby satisfying his burden on motion to suppress evidence, but State failed to prove legal search, defendant was entitled to have evidence suppressed. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(h)(3).

[7] Searches and Seizures 349 ⚿192.1

349 Searches and Seizures
349VI Judicial Review or Determination
349k192 Presumptions and Burden of Proof
349k192.1 k. In general. Most Cited Cases
(Formerly 349k192, 349k7(29))

Ultimate burden of proof as to validity of warrantless search is on the State.

[8] Criminal Law 110 ⚿1168(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error

this assertion may not, under certain limited circumstances, constitute 'evidence supporting his' (defendant's) 'position'.

[3] As early as 1847 our courts have taken judicial notice of their own records. Randall v. Parramore, 1 Fla. 409 (1847); Foxworth v. Wainwright, 167 So.2d 868 (Fla.1964). If a motion to suppress asserts as a basis therefor the Absence of a warrant for the seizure of the property, we can discern no legal impediment to a court taking judicial notice of its own files and records in the case pending before it to determine the existence vel non of such a warrant. The ascertainment (by judicial notice) that the court file contains no such warrant is 'evidence supporting his position' with respect to the defendant's allegation that the 'property was illegally seized without a warrant' just as if direct testimony was introduced. See 13 Fla.Jur., Evidence, sec. 42.

[4][5] The burden is upon the defendant (the moving party) to prove that the search was invalid; that burden can initially be met by a motion asserting the absence of a warrant and the court judicially noticing that its own file in the cause contains no such warrant. When the defendant's initial burden is met, it then shifts to the state to sustain the validity of the search. State v. Lyons, 293 So.2d 391 (Fla.App.1974); Bicking v. State, 293 So.2d 385 (Fla.App.1974); ***808**Urso v. State, 134 So.2d 810 (Fla.App.1961). See also United States v. Harris, 5 Cir. 1973, 479 F.2d 508. In Lyons, supra, 293 So.2d at 393, the Second District made the following pertinent observations:

'Thus what is required of the defendant is an initial showing of the search's invalidity, whereupon the burden of going forward shifts to the state. Two aspects of the rule would require, first of all, A pleading sufficient within itself to allege an unlawful search, and secondly, At the hearing, a prima facie showing of invalidity. . . .' (Emphasis ours.)

In our view a prima facie showing of invalidity may be made by motion supported by evidence Which the court may judicially notice. We do not deem it essential, in this regard, for defendant to introduce testimonial or documentary evidence with respect to the existence vel non of a warrant in the court file (although the better practice may suggest an affidavit by a court officer to that effect). If the court is capable of resolving an evidentiary matter, as in this case, by an inspection of its own files we see no purpose to be gained other than a prolongation of criminal proceedings to require that the defendant perform an unnecessary act.

[6][7][8] In the case sub judice when the defendant demonstrated a warrantless arrest and search a prima facie showing of invalidity was thereby established satisfying the defendant's burden under Rule 3.190(h)(3); the burden then shifted to the state to prove a legal search which it failed to do. See Bicking v. State, supra. It is well established that the ultimate burden of proof as to the validity of a warrantless search is on the state. Mann v. State, Fla.App.1974, 292 So.2d 432. Certainly the state had every opportunity to offer rebuttal evidence either by producing the warrant, if one was in existence, or by presenting testimony bearing upon the validity of the defendant's arrest and search. Having so failed to do, the trial court was left with no alternative but to grant defendant's motion to suppress.[FN2]

> FN2. Although there is merit to defendant's contention regarding judicial notice, this rule of evidence cannot satisfy the requirement that the motion 'clearly state the particular evidence sought to be suppressed'. As heretofore noted, defendant sought to suppress 'all tangible items of property and other evidence seized by the police from the defendant, his automobile or his premises'. This general allegation does not comply with the requirements of Rule 3.190(h) prescribing the contents of every motion to suppress. Cf. State v. Butterfield, 285 So.2d 626 (Fla.App.1973). The

667 So.2d 343, 20 Fla. L. Weekly D2418
(Cite as: 667 So.2d 343)

District Court of Appeal of Florida,
First District.

STATE of Florida, Appellant,
v.
David SETZLER, Michael Jones, and Lawrence H. Raker, Appellees.

No. 94–2497.
Oct. 24, 1995.

Robbery defendant's motion to suppress evidence was granted by the Circuit Court, Duval County, Alban Brooke, J., on ground that investigative stop of vehicle was lawful. State appealed. The District Court of Appeal, Benton, J., held that required reasonable suspicion existed when police officer observed vehicle with same number of occupants and traveling in same direction as identified in police radio transmission shortly after crime was committed.

Reversed and remanded.

West Headnotes

[1] Criminal Law 110 ⚿392.49(2)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(2) k. Presumptions and burden of proof. Most Cited Cases
(Formerly 110k394.5(4))

When search warrant has issued, defense has burden of going forward with motion to suppress and burden to establish grounds for suppression. West's F.S.A. Const. Art. 1, § 12; West's F.S.A. RCrP Rule 3.190(h)(3).

[2] Criminal Law 110 ⚿392.49(2)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(2) k. Presumptions and burden of proof. Most Cited Cases
(Formerly 110k394.5(4))

When no search warrant has been issued, prosecution has burden on motion to suppress to establish that evidence sought to be suppressed was obtained lawfully; defense need make only an initial showing at suppression hearing but has burden to prove standing when standing is at issue. West's F.S.A. Const. Art. 1, § 12; West's F.S.A. RCrP Rule 3.190(h)(3).

[3] Criminal Law 110 ⚿392.49(2)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(2) k. Presumptions and burden of proof. Most Cited Cases
(Formerly 110k394.5(4))

Absence of search warrant in court file shifts burden going forward on motion to suppress to prosecution as well as burden of demonstrating exigent circumstances or some other exception to warrant requirement. West's F.S.A. Const. Art. 1, § 12; West's F.S.A. RCrP Rule 3.190(h)(3).

[4] Criminal Law 110 ⚿1158.12

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.12 k. Evidence wrongfully obtained. Most Cited Cases
(Formerly 110k1158(4))

Appellate court reviewing pretrial order sup-

pressing evidence is bound by trial court's findings of fact, even if only implicit, made after suppression hearing unless those findings are clearly erroneous. West's F.S.A. § 924.071(1); West's F.S.A. R.App.P.Rule 9.140(c)(1)(B).

[5] Arrest 35 ⚿60.3(2)

35 Arrest
35II On Criminal Charges
35k60.3 Motor Vehicle Stops
35k60.3(2) k. Particular cases. Most Cited Cases
(Formerly 35k63.5(6))

Reasonable suspicion for investigative stop of vehicle existed when, after receiving police radio transmission, officer observed similar vehicle with same number of occupants traveling in direction identified in radio transmission, even though racial makeup of occupants was not same as described in radio transmission. West's F.S.A. Const. Art. 1, § 12.

[6] Arrest 35 ⚿60.2(10)

35 Arrest
35II On Criminal Charges
35k60.2 Investigatory Stop or Stop and Frisk
35k60.2(6) Grounds for Stop or Investigation
35k60.2(10) k. Reasonableness; reason or founded suspicion, etc. Most Cited Cases
(Formerly 35k63.5(4))

Investigatory stop is permissible if facts afford articulable, reasonable, particularized basis for suspicion that individual being stopped is or has been engaged in wrongdoing. West's F.S.A. Const. Art. 1, § 12.

[7] Arrest 35 ⚿60.3(1)

35 Arrest
35II On Criminal Charges
35k60.3 Motor Vehicle Stops
35k60.3(1) k. In general. Most Cited Cases
(Formerly 35k63.5(6))

Police radio transmission could give rise to reasonable suspicion justifying investigative stop of motor vehicle, even if transmission was hearsay. West's F.S.A. Const. Art. 1, § 12.

[8] Arrest 35 ⚿60.3(1)

35 Arrest
35II On Criminal Charges
35k60.3 Motor Vehicle Stops
35k60.3(1) k. In general. Most Cited Cases
(Formerly 35k63.5(6))

Crime victim's description of perpetrator may be credited when determining whether reasonable suspicion exists for investigatory stop of vehicle. West's F.S.A. Const. Art. 1, § 12.

***344** An appeal from the Circuit Court for Duval County. Alban Brooke, Judge.Robert A. Butterworth, Attorney General; Thomas Crapps, Assistant Attorney General, Tallahassee, for Appellant.

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellees.

BENTON, Judge.

The State appeals a pretrial order granting appellees' motions to suppress evidence implicating them in a robbery. The police obtained the evidence after stopping the truck in which they were travelling. We conclude that the facts established at the suppression hearing demonstrated a basis for reasonable suspicion justifying an investigative stop by the police, and that information subsequently obtained established probable cause for appellees' arrest and the seizure of property in and under the truck. We reverse on that basis.

As amended, the Florida Constitution requires that the Florida constitutional "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures ...

shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. (1982). This amendment to the Florida Constitution has procedural as well as substantive implications. *See generally State v. Lavazzoli*, 434 So.2d 321, 322 (Fla.1983) ("[T]he people of the State of Florida approved an amendment to article I, section 12 of the Florida Constitution, effective January 4, 1983 ... [which] mandated conformity of the interpretation of article I, section 12's exclusionary rule with the United States Supreme Court's interpretation of the fourth amendment to the United States Constitution.").

"Fourth Amendment issues ... are not always finally resolved at the trial level." Wayne R. LaFave, Search and Seizure § 11.7, at 505 (2d ed. 1987). In reviewing search and seizure decisions, Florida courts and federal courts alike must apply different standards of review, depending on the nature of the questions presented. Aspects or components of the trial court's decision resolving legal questions are subject to *de novo* review, while factual decisions by the trial court are entitled to deference commensurate with the ***345** trial judge's superior vantage point for resolving factual disputes.

Special deference may be owed fact finding by a magistrate who has issued a search warrant after finding probable cause. *See Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984).

> [A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli [v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)] ..., 393 U.S., at 419, 89 S.Ct., at 590. "A grudging or negative attitude by reviewing courts toward warrants," [*United States v.] Ventresca*, [380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)], 380 U.S., at 108, 85 S.Ct., at 745, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, at 109, 85 S.Ct., at 746.

Illinois v. Gates, 462 U.S. 213, 237, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983). In the present case, however, neither affidavit nor warrant preceded seizure of the evidence in question.

Burden of Proof at Suppression Hearing

[1] At the hearing on appellees' motion to suppress, once appellees' standing was clear, the absence of a warrant meant the prosecution had the burden to establish that the evidence sought to be suppressed was obtained lawfully. Florida Rule of Criminal Procedure 3.190(h)(3) provides:

> If the court hears the motion on its merits, the defendant shall present evidence supporting the defendant's position, and the state may offer rebuttal evidence.

This provision contemplates a hearing on a motion to suppress the fruits of a search pursuant to warrant, and does not fully describe the procedure constitutionally required in the case of unwarranted searches and seizures. When a search warrant has issued, the defense has the burden of going forward, and the burden to establish grounds for suppression.

[2] In the absence of a warrant, however, the defense need make only an "initial showing," *State v. Lyons*, 293 So.2d 391, 393 (Fla. 2d DCA 1974) at the suppression hearing. *Williams v. State*, 640 So.2d 1206 (Fla. 2d DCA 1994); *State v. Fortesa–Ruiz*, 559 So.2d 1180, 1181 (Fla. 3d DCA) , *review denied*, 574 So.2d 143 (1990); *Morales v. State*, 407 So.2d 321, 325 (Fla. 3d DCA 1981); *Black v. State*, 383 So.2d 295 (Fla. 1st DCA), *review denied*, 392 So.2d 1371 (Fla.1980); *Andress v. State*, 351 So.2d 350 (Fla. 4th DCA 1977); *Pineda v. State*, No. 92–06–AP (Fla. 8th Cir. Ct. March 19, 1993). The defense has the burden to prove stand-

ing, where standing is at issue. *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Jones v. State*, 648 So.2d 669, 674–76 (Fla.1994), *cert. denied*, 515 U.S. 1147, 115 S.Ct. 2588, 132 L.Ed.2d 836 (Fla.1995). *See United States v. Padilla*, 508 U.S. 77, 79–81, 113 S.Ct. 1936, 1938–39, 123 L.Ed.2d 635 (1993); *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Here no real issue as to appellees' standing exists.

[3] Once the defense made its "initial showing," the prosecution had to prove probable cause for (or otherwise explain) the *fait accompli* at the suppression hearing, because the State did not justify the search before the fact, by showing a judge grounds for issuance of a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); *Jones*, 648 So.2d at 674. As a practical matter, absence of a search warrant in the court file sufficed to shift the burden of going forward to the prosecution. *State v. Hinton*, 305 So.2d 804, 808 (Fla. 4th DCA 1975); *see also State v. Williams*, 538 So.2d 1346, 1348 (Fla. 4th DCA 1989). The prosecution also had to demonstrate exigent circumstances, conditions which precluded applying to a neutral and detached magistrate for a search warrant, or some other exception to the warrant requirement. *Coolidge;* ***346***Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

Procedure on Review

District courts of appeal "may review interlocutory orders in ... [felony prosecutions, among other cases] to the extent provided by rules adopted by the supreme court." Art. V, § 4(b)(1), Fla. Const. (1968). The appellate rules authorize the State to appeal orders "suppressing before trial ... evidence obtained by search and seizure." Fla.R.App.P. 9.140(c)(1)(B). Whatever its efficacy, a statute also recites that the "state may appeal from a pretrial order ... suppressing evidence." § 924.071(1), Fla.Stat. (1993).

[4] A reviewing court is bound by the trial court's findings of fact—even if only implicit—made after a suppression hearing, unless they are clearly erroneous. On the other hand, deference to clearly erroneous findings of fact is not consistent with the review required in Fourth Amendment cases. *E.g., United States v. Fernandez*, 58 F.3d 593, 596 (11th Cir.1995) ("The denial of a motion to suppress presents a mixed question of law and fact. We must defer to the district court's findings of fact unless clearly erroneous, but we are to review the district court's application of the law to the facts *de novo*. In reviewing the denial of a motion to suppress, we construe the facts in the light most favorable to the prevailing party below.")

Evidence Adduced

[5] At the suppression hearing, the parties agreed that the motions would be decided on the basis of testimony the officer who made the stop gave on deposition. The learned trial judge made findings of fact:

> The stop occurred in the early morning hours after mid-night. It came about because the Jacksonville Sheriff's Office dispatcher put out a BOLO on a cream colored pick-up with three black males leaving the scene of a robbery. The location of the robbery was between one and two and one half miles from the location of the stop. The time of the stop was apparently only a short time after the BOLO.
>
> Considering the totality of the circumstances necessary to support a stop, the downside to this stop is that (1) the time is not clear; (2) the area where the stop took place was not an area of limited access to the scene of the crime; (3) the passengers in the truck were not *all* black males. (Two were black but the third was white. The officer's explanation was that he thought the BOLO might be in error.) (4) There was nothing about the truck or its equipment that gave rise to any feeling on the part of the officer that a stop was

reasonable.

The trial court ruled that neither these facts nor the evidence adduced at the suppression hearing established a legal basis for stopping the truck, arresting appellees, or seizing as evidence a watch, a wallet, and a bicycle.

Officer Bass of the Jacksonville Sheriff's Office testified on deposition that police radio transmitted a "BOLO" (advice to be on the lookout) for three black males in a cream-colored Ford pick-up truck last seen heading west on Baymeadows Road toward San Jose on the night of March 10, 1994. Officer Bass testified that, hearing this, he stopped his patrol car at an intersection "near Old Kings and San Jose" that he believed the suspects might pass through; that he then saw a cream-colored Ford pick-up truck drive by; that he followed the pick-up truck a short distance in his own vehicle; that he determined that three males—two black and one white—occupied the truck; and that he pulled the truck over "to see if they were the suspects." Evidence at the suppression hearing did not indicate the precise time either of the BOLO or of the stop. The State did not establish the exact distance between the stop and the crime scene.

After the driver and at least one of the passengers had gotten out of the truck, Officer Bass asked where they were going, and where had they been. Within a minute of stopping the truck, he called the dispatcher, who told him that the robbers' truck had a bicycle in the truck bed. There were two bicycles (and a silver watch) in the bed of appellees' truck. Officer Bass asked for ***347** backup. Shortly thereafter, appellee Jones said something to the effect that he could not afford to go back to jail and started running. Officer Bass gave chase and caught him, however. When another officer brought the robbery victim to the scene, he identified appellees Setzler and Jones as the persons who robbed him. Appellee Raker was also arrested after he threw what turned out to be the victim's wallet underneath the truck.

Reasonable, Particularized Suspicion

Charged with robbery, appellees moved to suppress the physical evidence as well as any testimony recounting the statements appellee Jones had made, on grounds that this evidence was all the product of an illegal stop and detention. The Florida Stop and Frisk Law provides:

> (2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state ..., he may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding his presence abroad which led the officer to believe that he had committed, was committing, or was about to commit a criminal offense.
>
> (3) No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to effect the purposes of that subsection. Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.
>
> (4) If at any time after the onset of the temporary detention authorized by subsection (2), probable cause for arrest of person shall appear, the person shall be arrested. If, after an inquiry into the circumstances which prompted the temporary detention, no probable cause for the arrest of the person shall appear, he shall be released.
>
> ....
>
> (6) No evidence seized by a law enforcement officer in any search under this section shall be admissible against any person in any court of this state or political subdivision thereof unless the search which disclosed its existence was authorized by and conducted in compliance with the provisions of subsections (2)-(5).

As a matter of law, we conclude that the BOLO coupled with the mode, time, and direction of appellees' travel gave Officer Bass a reasonable indication that appellees were the robbers he had been told to be on the lookout for. Although only two of the three were black, Officer Bass not unreasonably surmised that the BOLO might be in error on that point, events having transpired in the dark of night.

But this does not end our inquiry. This is not a case in which constitutional adjudication can be avoided by statutory construction—although in an appropriate case proper construction of the Florida Stop and Frisk Law might avoid unnecessary constitutional adjudication. *See generally State v. Iacovone*, 660 So.2d 1371 (Fla.1995); *State v. Mozo*, 655 So.2d 1115 (Fla.1995); *Singletary v. State*, 322 So.2d 551, 552 (Fla.1975). Implementing Florida citizens' rights to privacy and security, the Legislature may by statute require the exclusion of evidence which might be admissible as a matter purely of constitutional law. *See Mozo, supra.* No statute can render evidence admissible, however, if the Fourth Amendment and article I, section 12 of the Florida Constitution require exclusion.

Clearly the trial court is correct that no broken tail light or the like justified stopping the truck appellees were in. On the other hand, the make, color, and location of the truck, the direction in which it was travelling, and the number of its passengers all reasonably led Officer Bass to his decision to pull the truck over and make inquiry. No more than two and a half miles from the crime scene, Officer Bass spotted appellees driving away from the crime scene in a vehicle matching the BOLO description only "a short time" after the BOLO issued. While we agree with the trial court that greater specificity as to the times involved and as to the distance between the crime scene and the stop would have been preferable, we cannot ***348** agree that the State failed to prove a legal basis for the stop.

We hold that Officer Bass was "reasonably suspicious" and therefore justified in making the stop. *Cf. Cobb v. State*, 642 So.2d 656 (Fla. 1st DCA 1994) (where BOLO described three black male pedestrians who had robbed a rural convenience store, officer reasonably concluded that the suspects would have an automobile nearby and would drive toward a predominantly black community). While the route appellants took was not the only way they might have left the crime scene, it was a predictable route, given the direction in which they set out.

> A law enforcement officer "may conduct a brief investigative stop of a vehicle, analogous to a *Terry*-stop, if the seizure is justified by specific articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct." *United States v. Strickland*, 902 F.2d 937, 940 (11th Cir.1990). An investigatory stop which is solely based upon "inarticulate hunches" or "unparticularized suspicion" is invalid. *Terry v. Ohio*, 392 U.S. 1, 22, 27, 88 S.Ct. 1868, 1880, 1883, 20 L.Ed.2d 889 (1968). Further, "investigatory stops are invalid as pretextual unless 'a reasonable officer would have made the seizure in the absence of illegitimate motivation.' " *Strickland*, 902 F.2d at 940 (quoting *United States v. Smith*, 799 F.2d 704, 708 (11th Cir.1986)) (emphasis in original).

United States v. Harris, 928 F.2d 1113, 1116 (11th Cir.1991). In *State v. Webb*, 398 So.2d 820, 822 (Fla.1981), our supreme court interpreted *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) to require that an officer making a traffic stop "must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably justify the stop."

[6] An investigatory stop is permissible if the facts afford an articulable, reasonable, particularized basis for suspicion that an individual being stopped is or has been engaged in wrongdoing. *See State v. Daniel*, 665 So.2d 1040 (Fla.1995); *Tamer v. State*, 484 So.2d 583 (Fla.1986). This test was met here. Since the stop was lawful, seizure of the evidence—all of which was in plain view—was also lawful. Evidence was seized only after Officer

653 So.2d 422 (1995)

The STATE of Florida, Appellant,

v.

Sean SLANEY, Appellee.

No. 93-1176.

District Court of Appeal of Florida, Third District.

March 22, 1995.
Rehearing Denied May 10, 1995.

Robert A. Butterworth, Atty. Gen., and Mark Rosenblatt, Asst. Atty. Gen., for appellant.

Colodny, Fass & Talenfeld and Stuart B. Yanofsky, Fort Lauderdale, for appellee.

Before HUBBART and COPE and GODERICH, JJ.

HUBBART, Judge.

This is an appeal by the state from an order of the Dade County Court granting the defendant Sean Slaney's motion to suppress the results of a blood alcohol test conducted on a blood sample involuntarily taken from the defendant by medical personnel at the request of the police; this order was entered in a criminal traffic case in which the defendant was charged with driving a motor vehicle while under the influence of an alcoholic beverage [hereinafter DUI]. In the order under review, the Dade County Court certifies that this case raises a question of great public importance, which question we rephrase as follows:

> "If [as here] a police officer [based on probable cause] arrests a [conscious] defendant for driving [a motor vehicle] under the influence [of an alcoholic beverage after a traffic accident in which no person has been killed or seriously injured and where the administration of a breath or urine test is not otherwise impractical or impossible], may [the officer] require the defendant to submit to [an involuntary] blood withdrawal performed by medically qualified personnel ...?"

We reject the defendant's arguments to the contrary and conclude that this court has jurisdiction to entertain this appeal as one taken from a non-final order of the county court certified to be of great public importance. Art. V, § 4(b)(1), Fla. Const.; Fla. R.App.P. 9.030(b)(4), 9.160. Moreover, for the reasons which follow, we answer the certified question in the negative upon a holding that the withdrawal of such a blood sample (1) constitutes a violation of Florida's implied consent law under Sections 316.1932(1)(c), 316.1933(1), Florida Statutes (1991), and (2) cannot otherwise be justified on the basis of the defendant's voluntary consent; accordingly, we affirm the order under review suppressing as evidence the results of the subject blood test.

I

The facts of this case, as found by the trial court in the order under review and supplemented by other undisputed evidence, are as follows:

> "The defendant [Sean W. Slaney] was involved in a one-car [traffic] accident [in the late evening hours of May 12, 1992 in Dade County, Florida, when he lost control of the car he was driving, left the public street and ran into a tree]. Police and [f]ire [r]escue responded to the scene. The defendant, who was [conscious and] bleeding from his forehead was treated by [f]ire [r]escue and the bleeding was stopped. [After placing the defendant under arrest for driving a motor vehicle while under the influence of an intoxicating beverage[1],] [t]he first [police] officer on the scene requested that the [p]aramedic withdraw a blood sample from the defendant[;] however, the [p]aramedic was unable to do so because he lacked the proper equipment. The first officer believed the defendant was not seriously injured.

> The second [police] officer that arrived on the scene testified that he read to the defendant the [i]mplied [c]onsent [l]aw [from a form;] however, the second officer testified that wherever the words breath or urine appeared [on the form] he substituted the word 'blood' [i.e., that the defendant would lose his driver's license if he refused to consent to a blood draw]. The second officer further testified that the defendant agreed to give blood only after [the officer] read to the defendant the modified [i]mplied [c]onsent [l]aw. The second officer took the defendant to the hospital where a qualified medical person at [the officer's] request withdrew a blood sample from the defendant."

The defendant was charged with driving a motor vehicle while under the influence of an alcoholic beverage [§ 316.193, Fla. Stat. (1991)] before the Dade County Court; he entered a plea of not guilty and filed a pretrial motion to suppress the results of the blood alcohol test performed on the blood sample taken from him. The motion came on for an evidentiary hearing at which the above-stated facts were adduced.

The defendant contended below that the police were only authorized to demand a blood sample from a motorist under Sections 316.1932(1)(c), 316.1933(1), Florida Statutes (1991), and that neither of these statutes were applicable to this case; accordingly, he argued that the blood sample was illegally obtained from the defendant and the results of the subsequent blood test performed on this sample should be suppressed at defendant's criminal traffic trial. The state did not deny that the above statutes were inapplicable in this case, but argued that the blood tests were nonetheless admissible in evidence under the authority of *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) and *Robertson v. State*, 604 So.2d 783 (Fla. 1992) because (1) the defendant was lawfully arrested for DUI, (2) the blood was withdrawn from the defendant incident to this lawful arrest by medical personnel pursuant to medically approved procedures, and (3) the core policies of the implied consent statutes were observed in this case.

The trial court agreed with the defendant and suppressed the blood test results based on its conclusion that "blood may be withdrawn for a DUI prosecution only within the parameters of [§§] 316.1932(1)(c) and 316.1933(1)" which, without dispute, were not complied with by the police in this case. The state appeals.

II

The law is well settled that it is not an unreasonable search within the meaning of the Fourth Amendment to the United States Constitution, as made enforceable against the states under the Due Process clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), for police to obtain a warrantless involuntary blood sample from a defendant who is under arrest for DUI provided (1) there is probable cause to arrest the defendant for that offense, and (2) the blood is extracted in a reasonable manner by medical personnel pursuant to medically approved procedures. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). It is equally well settled, however, that the states are privileged under their state law to adopt higher, but not lower, standards for police conduct than those required by the Fourth Amendment. *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967) (state constitutional provision on search and seizure); *Sibron v. New York*, 392 U.S. 40, 61, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968) (state statute). In Florida, these higher standards may not, as a matter of state law, be imposed under the state constitutional guarantee against unreasonable searches and seizures, Art. I, § 12, Fla. Const. (1982 amendments); *Bernie v. State*, 524 So.2d 988 (Fla. 1988), but may be imposed by other provisions of Florida law, including a state statute. *Compare Shaktman v. State*, 553 So.2d 148 (Fla. 1989) (pen registers regulated under Article I, section 23 of the Florida Constitution) *with Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (pen registers; Fourth Amendment).

Indeed, it is the established law of this state that Florida's implied consent statutes [§§ 316.1932, 316.1933, 316.1934, Fla. Stat. (1991)] impose, in certain respects, higher standards on police conduct in obtaining breath, urine, and blood samples from a defendant in a DUI case than those required by the Fourth Amendment. The Florida Supreme Court in *Sambrine v. State*, 386 So.2d 546, 548 (Fla. 1980), has so stated:

> "What is at issue here ... is ... the right of the state of Florida to extend to its citizenry protections against unreasonable searches and seizures greater than those afforded by the federal constitution [through the Fourth Amendment]. This it has done through the enactment of section 322.261, Florida Statues (1975) [now sections 316.1932, 316.1933, Florida Statutes (1991)]."

As further stated by the Fifth District Court of Appeal in State v. McInnis, 581 So.2d 1370, 1374 (Fla. 5th DCA), *cause dismissed,* 584 So.2d 998 (Fla. 1991),

> "One public policy reason for enacting such a statutory scheme [Florida's implied consent statutes] is the legislature's decision to extend to some motorists driving in Florida greater protection and rights of privacy than are provided by the state or federal constitutions."

In particular, Florida's implied consent statutes (1) limit the power of the police to require a person who is lawfully arrested for DUI to give samples of his/her breath, urine, or blood without the person's consent, and (2) prescribe the exact methods by which such samples may be taken and tested. These limitations and prescribed procedures represent higher standards for police conduct in obtaining samples of this nature from a DUI defendant than those required by the Fourth Amendment and are entirely permissible as a matter of state law. *Cooper; Sibron.*

A

First, as to the limitation on police power to require a person to give breath, urine, and blood samples after a DUI arrest, the implied consent statutes impose certain well-defined restrictions which otherwise exceed Fourth Amendment standards.

1

Section 316.1932(1)(a), Florida Statutes (1991), provides that any person who accepts the privilege of driving a motor vehicle in this state and who is lawfully under arrest for DUI is "deemed to have given his consent" to the withdrawal of breath and urine samples — but not blood samples — from his or her person and to the scientific testing of such samples. The statute, however, does not provide for the forcible taking of breath and urine samples — which arguably *Schmerber* authorizes — as it gives the arrested person the option to refuse to give such samples, although certain consequences are imposed for the refusal. Accordingly, the person must be advised that the failure to submit to a lawful test of his/her breath or urine "will result in the suspension of his [or her] privilege to operate a motor vehicle," § 316.1932(1)(a), Fla. Stat. (1991), for a certain period of time, which suspension becomes effective immediately upon such refusal, *see* § 322.2615, Fla. Stat. (1991); further, the refusal to take the breath or urine test "shall be admissible into evidence in any criminal proceeding." § 316.1932(1)(a), Fla. Stat. (1991). As the Florida Supreme Court has stated, "[u]nder this provision, a conscious person is given the right to refuse to take a chemical [breath or urine] test if he [or she] is willing to suffer a ... suspension of his [or her] driving privilege," and "[a]ny careful reading of section [316.1932(1)] leads to the inescapable conclusion that a person is given the right to refuse [breath or urine] testing." Sambrine v. State, 386 So.2d 546, 548 (Fla. 1980). On the other hand, if the arrested person agrees to a breath or urine test after being properly advised as provided above, a sample of the person's breath or urine may be withdrawn for chemical testing purposes.

Notwithstanding the above implied consent statutes, however, it is clear that a person who is arrested for DUI may volunteer or otherwise freely consent to give a sample of his/her breath or urine for chemical testing purposes. § 316.1932(1)(c), Fla. Stat. (1991). A sample of such a person's breath or urine may properly be withdrawn under these circumstances as well, quite apart from the implied consent statutes. *See* Robertson v. State, 604 So.2d 783, 790 (Fla. 1992) (following State v. Wallin, 195 N.W.2d 95, 98 (Iowa 1972)); *compare* Chu v. State, 521 So.2d 330 (Fla. 4th DCA 1988).

2

Sections 316.1932(1)(c) and 316.1933(1), Florida Statutes (1991) carve out two exceptions to the above statutory scheme under which a blood sample may be taken from a person lawfully arrested for DUI. An involuntary blood withdrawal arguably represents a greater intrusion into an arrestee's personal privacy than breath and urine withdrawals and, consequently, is not permitted if these two exceptions are inapplicable.

Section 316.1932(1)(c) provides that a person who is lawfully arrested for DUI is "deemed to have consented" to the withdrawal of a blood sample "if such person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or

urine test is impractical or impossible." Also, if the person is "incapable of refusal by reason of unconsciousness or other mental or physical condition," a blood withdrawal is authorized and the person need not be advised that the refusal to consent to a blood test will result in the loss of the person's driving privileges. If the person is "capable of refusal," however, the statute does not provide for the forcible taking of a blood sample — which clearly *Schmerber* authorizes — but, instead, gives the person the option to refuse the blood withdrawal, although certain consequences are imposed for the refusal. These are the same consequences provided for refusing to give a breath or urine sample for testing, namely, (a) the suspension of the person's driver's license for a certain period of time, and (b) the admission into evidence of such refusal in any criminal proceeding. Moreover, the person must be advised that the failure to submit to a blood withdrawal will result in the suspension of the person's driving privileges — the same advisement which must be given prior to obtaining a breath or urine withdrawal.

Section 316.1933(1) provides that a law enforcement officer is authorized to demand a 427 blood withdrawal from any person who is lawfully arrested for DUI if there is probable cause to believe that the person "has caused the death or serious bodily injury of a human being." The arrested person has no right to refuse a blood withdrawal in such a serious case, and, indeed, a law enforcement officer "may use reasonable force if necessary to require such person to submit to the administration of a blood test."

The Florida Supreme Court in State v. Perez, 531 So.2d 961 (Fla. 1988), has interpreted the above statutes, as follows:

> "Thus, the general scheme for determining if a motorist is impaired is: (1) before an arrest, the suspect may consent to or demand a breath test; and (2) after an arrest, the person is deemed to have implicitly consented to a breath test and a urine test.
>
> The first exception to this general scheme is given in section 316.1932(1)(c), whereby a `person whose consent is implied' i.e., is lawfully arrested, is taken for treatment to a medical facility and a breath or urine test is impossible or impractical to perform. Only then may a blood test be requested, subject to the person's refusal. The subsection further provides penalties for such a refusal but does not authorize the officer to proceed with the test regardless of the refusal.
>
> The other exception to the general scheme of breath and urine testing is found in section 316.1933(1), the statute in question. Again, this statute expressly authorizes blood tests where an officer has probable cause to believe an impaired driver has caused death or serious injury to a human being. In short, these sections together narrowly define the circumstances in which testing for impairment is allowed absent express consent, and they carve out two narrow exceptions to the scheme which allow blood tests."

Id. at 963-64 (footnote omitted).

Similarly, the Fourth District Court of Appeal in *Chu v. State*, 521 So.2d 330 (Fla. 4th DCA 1988) has interpreted the above statutes as follows:

> "We think it is clear that the legislature intended and provided for the use of breath and urine tests, except under the circumstances described in sections 316.1932(1)(c) and 316.1933(1) and that the legislature did not intend to authorize a law enforcement officer to request a blood test when the conditions described in these statutes do not exist. However, we also recognize that circumstances may occur where it is more convenient for a person to submit to a blood test rather than a breath or urine test. Under such circumstances we see no reason to exclude a voluntary blood test provided the person has been fully informed that the implied consent law requires submission only to a breath or urine test and that the blood test is offered as an alternative. The key to admissibility is that the consent must be knowingly and voluntarily made and not as the result of the acquiescence to lawful authority."

Id. at 332.

Notwithstanding the above implied consent statutes, however, it is clear that a person arrested for DUI may, as stated in *Chu,* volunteer or otherwise freely consent to give a sample of his/her blood for chemical testing purposes. A sample of such a person's blood may properly be withdrawn under these circumstances as well, quite apart from the implied consent statutes. *Chu; see* Robertson v. State, 604 So.2d 783, 790 (following *State v. Wallin,* 195 N.W.2d 95, 98 (Iowa 1972)).

3

It is well settled that the results of a scientific test performed on a blood sample [as well as, presumably, a breath and urine sample] which is involuntarily taken from a defendant in violation of the above provisions of the implied consent statutes — limiting, as they do, the power of the police to require a person arrested for DUI to give such a sample — is inadmissible in evidence at the defendant's trial, even though the sample may have otherwise been seized in compliance with Fourth Amendment standards. Indeed, the Florida Supreme Court and the District Courts of Appeal, in a long line of cases, have routinely excluded from evidence the results of a scientific test performed on a blood sample involuntarily taken from a defendant when, under our implied consent statutes, the police were not authorized to require the defendant to give such a sample.[2] On the other hand, as an exception to this rule, it is clear that the results of a scientific test performed on a breath, urine, or blood sample volunteered or otherwise voluntarily consented to by a DUI arrestee, unlike this case, are admissible in evidence quite apart from the implied consent statutes. *Chu v. State*, 521 So.2d 330 (Fla. 4th DCA 1988); *see Robertson v. State*, 604 So.2d 783, 796 (Fla. 1992) (following *State v. Wallin*, 195 N.W.2d 95, 98 (Iowa 1972)).

B

Second, the implied consent statutes establish certain prescribed methods by which breath, urine, or blood samples may be scientifically withdrawn from a DUI arrestee and later scientifically tested — where the police are otherwise authorized under the implied consent statutes to request or order the withdrawal of such sample in the first instance as discussed above. These detailed procedures are generally not required by the Fourth Amendment and, for this most part, exceed Fourth Amendment standards.

Section 316.1933(2)(a), Florida Statutes (1991) authorizes "[o]nly a physician, certified paramedic, registered nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician"[3] to withdraw blood from a DUI arrestee at the request of a law enforcement officer. Section 316.1933(2)(b), Florida Statutes (1991) further provides that a chemical analysis of such a blood sample "must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services[4] and by an individual possessing a valid permit issued by the department for this purpose," but Section 316.1934(3), Florida Statutes (1991) provides that "[a]ny insubstantial differences between approved techniques and actual testing procedures in any individual case, shall not render the test or test results invalid."[5]

Section 316.1932(1)(a), Florida Statutes (1991) also provides that a "urine test shall be ... administered at a detention facility or any other facility, mobile or otherwise, which is equipped to administer such tests at the request of a law enforcement officer... ." Section 316.1932 (1)(b), Florida Statutes (1991) also provides that an analysis of a breath sample "must have been performed substantially according to methods approved by the Department of Health and Rehabilitative Services,"[6] but "[a]ny insubstantial differences between approved techniques and actual testing procedures in any individual case does not render the test or test results invalid." § 316.1932(1) (b), Fla. Stat. (1991).

In *Robertson v. State*, 604 So.2d 783 (Fla. 1992), the Florida Supreme Court fashioned a limited exclusionary rule for violations of these scientific withdrawal and testing procedures of the implied consent statutes. Referring to *State v. Bender*, 382 So.2d 697 (Fla. 1980), wherein the Court upheld the constitutionality of certain of these procedures [i.e., administrative rules promulgated under the implied consent statutes], the Court in *Robertson* stated:

> "In *Bender*, the Court conducted a thorough analysis of Florida's `implied consent law' and its relation to the earlier common law and other evidentiary principles governing the admissibility of expert testimony in a DUI-related prosecution. First, the *Bender* Court expressly recognized that the implied consent law includes an exclusionary rule prohibiting the use of blood-test results taken contrary to its core policies.[5]
>
> [5]. As is noted more fully below, this exclusionary rule does not prohibit the use of *all* evidence obtained contrary to the implied consent law, but only such evidence obtained in a manner that is contrary to the core policies of that statute: ensuring scientific reliability of the tests, and protecting the health of test subjects. To this extent, the present opinion clarifies the holding of *Bender*."

604 So.2d at 789 (footnote 4 omitted).

The Court then noted that application of this limited exclusionary rule can result in the exclusion of breath, urine, or blood sample testing conducted in violation of the above-stated core policies:

> "Several cases from the district courts of appeal can be understood as resting on the same policies stated in *Bender.* For example, in some cases in the district courts have suppressed evidence from blood samples drawn by persons who completely lacked authorization. *E.g.*, *Albritton v. State*, 561 So.2d 19 (Fla. 5th DCA 1990); *State v. Roose*, 450 So.2d 861 (Fla. 3d DCA), *review denied*, 451 So.2d 850 (Fla. 1984). Similarly, such evidence has been suppressed where testing equipment was not properly maintained or stored. *Donaldson v. State*, 561 So.2d 648 (Fla. 4th DCA 1990), *approved*, 579 So.2d 728 (Fla. 1991); *State v. Wills*, 359 So.2d 566 (Fla. 2d DCA 1978). Clearly, the use of unauthorized persons to draw blood and the use of improperly maintained equipment could threaten the health of test subjects. Thus, on this basis, the exclusionary rule of the implied consent law requires that such evidence be suppressed."

604 So.2d at 790.

Finally, the Court recognized two exceptions to this limited exclusionary rule:

> "[1] In much the same vein, the courts generally have recognized exceptions to the implied consent law's exclusionary rule *provided* those exceptions are consistent with the policies underlying the law. For example, the Iowa court concluded in *Wallin* that compliance with the statute is not necessary (a) where consent to the test existed on some independent basis, or (b) to the extent that the defendant waived the rights provided by the statute. *Wallin*, 195 N.W.2d at 98. As to the first of these categories, it is clear that a person only needs the protection of the implied consent law if the testing provisions of the law actually are being invoked by the state. If the defendant has consented to the test, or consent is implied on some basis independent of the DUI laws, then the blood test falls wholly outside the scope of the implied consent law.[7] Likewise, a defendant has complete freedom to voluntarily waive the protections created by the statute."
>
> [7]. In other words, the implied consent statute and its exclusionary rule apply only when blood is being taken from a person based on probable cause that the person has caused death or serious bodily injury as a result of a DUI offense specified in the statutes."

604 So.2d at 790.

> "[2] Based on the policies elaborated above, we believe that one further exception to the exclusionary rule exists. We hold that the implied consent law does not absolutely forbid the admission into evidence of blood-alcohol test results and related testimony produced by an unlicensed expert, subject to two important provisos. First, the blood must have been drawn by a person authorized to do so by the implied consent statute. *See* [*State v.*] *Gillman* [390 So.2d 62 (Fla. 1980)]; § 316.1933(2)(a), Fla. Stat. (1987). And second, the evidence so produced cannot be admitted unless the state establishes the three-prong predicate described in *Bender.*"

604 So.2d at 791 (footnote omitted).

> "*Bender* noted that, prior to the adoption of the implied consent law, scientific test results for intoxication were admissible
>
> 'if a proper predicate established that (1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment and (3) expert testimony was presented concerning the meaning of the test.'"

604 So.2d at 789.

Contrary to the state's argument, it is important to understand that the above limited exclusionary rule and its exceptions refer solely to violations of the implied consent statutes concerning the scientific methods by which breath, urine, and blood samples may be withdrawn and later tested. This rule and its exceptions presuppose that the police had the authority under the implied consent statutes to request or order a DUI arrestee to give the underlying breath, urine, or blood sample in the first instance, else these scientific withdrawal and testing provisions become totally inapplicable. *Robertson*, 604 So.2d at 790 n. 7. Where the police lack such authority in the first instance under the implied consent statutes, the ensuing involuntary breath, urine, or blood sample obtained, as well as the results of

any scientific tests performed on the sample, are inadmissible in evidence at the DUI arrestee's trial under the exclusionary rule followed by the Florida Supreme Court and District Courts of Appeal in the *Sambrine-Perez* line of cases, discussed previously.[7] Indeed, the *Robertson* Court implicitly assumes the viability of this well-established exclusionary rule.

III

Turning to the instant case, it is undisputed that the police had no authority under the implied consent statutes to request a blood sample from the defendant or to advise the defendant that he would lose his driver's license if he refused to consent to a blood withdrawal. Although it is assumed for purposes of this appeal that the police had probable cause to arrest the defendant for driving a motor vehicle while under the influence of an alcoholic beverage, there was utterly no showing below that "a breath or urine test [was] impractical or impossible," and so there was no basis under Section 316.1932(1)(c), Florida Statutes (1991), for the police to require the defendant to give a blood sample nor to advise the defendant that he would lose his driver's license if he failed to consent to such a blood withdrawal. Nor was there any showing below that the defendant was incapable of a refusal to consent to a blood withdrawal "by reason of unconsciousness or other mental or physical condition" which would have authorized such a blood withdrawal under Section 316.1932 (1)(c), Florida Statutes (1991); to the contrary, the record shows that the defendant was fully conscious and alert at the time the blood sample was taken from him at the hospital. Moreover, it has been held that where, as here, a DUI arrestee consents to a blood withdrawal after being improperly advised that he will lose his driver's license if he fails to give such consent, the ensuing consent is involuntary in nature because it was induced by a misrepresentation. *State v. Burnett*, 536 So.2d 375 (Fla. 2d DCA 1988); *see also* *State v. Polak*, 598 So.2d 150 (Fla. 1st DCA 1992) (breath sample).

Beyond that, there was utterly no basis for an involuntary blood withdrawal from the defendant under Section 316.1933(1), Florida Statutes (1991). Although there was apparent probable cause to arrest the defendant for DUI, there was utterly no showing below that the defendant had "caused the death or serious bodily injury of a human being," as required by that statute in order to take an involuntary blood sample from the defendant. To the contrary, the record shows that the defendant was involved in a one-car traffic accident in which neither he nor any third party was seriously injured in any way.

Because the blood sample taken from the defendant in this case was entirely unauthorized under Sections 316.1932(1)(c), 316.1933(1), Florida Statutes (1991), and was otherwise involuntarily given, it is plain that this blood sample and the results of the scientific test performed on this sample were inadmissible in evidence at the defendant's DUI trial below under the *Sambrine-Perez* line of cases. The state makes two arguments to avoid this inevitable result.

First, it is urged that the involuntary blood withdrawal obtained from the defendant complied with Fourth Amendment standards under *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) because (1) there was probable cause to arrest the defendant for DUI, and (2) the blood was withdrawn from the defendant in a reasonable manner pursuant to medically approved procedures. This argument, however, overlooks the fact that Florida is entitled, as a matter of state law, to impose higher standards on its police officers when obtaining an involuntary blood withdrawal from a person lawfully arrested for DUI than those required by the Fourth Amendment. *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967). Florida has done precisely that by enacting Sections 316.1932(1)(c), 316.1933(1), Florida Statutes (1991), which, without dispute, the police violated in this case. Accordingly, the blood sample and the results of the scientific test performed were inadmissible in evidence as a matter of state law.

Second, the state argues that the blood sample was scientifically withdrawn from the defendant and subsequently tested in full compliance with the "core policies" of the implied consent statutes and therefore — notwithstanding the violation of Sections 316.1932(1)(c), 316.1933(1) — the blood test results were admissible under the exclusionary rule announced in *Robertson v. State*, 604 So.2d 783, 789 (Fla. 1992). As previously explained, however, the *Robertson* exclusionary rule and its exceptions presuppose that the police were authorized under the implied consent statutes to request or order a blood withdrawal from the DUI arrestee in the first instance. Because the police were not authorized to request or order the blood withdrawal from the defendant in this case, the blood sample and the results of the scientific test performed were inadmissible in evidence.

For the above-stated reasons, the county court order under review suppressing the results of a blood test performed on a blood sample involuntarily drawn from the defendant at the request of the police in violation of Sections 316.1932(1)(c), 316.1933(1), Florida Statutes (1991), is, in all respects,

Affirmed.

[1] It is assumed for purposes of this appeal that this arrest was based on probable cause.

[2] *State v. Perez*, 531 So.2d 961 (Fla. 1988) (blood sample taken from a lawfully arrested DUI defendant without his consent after being involved in accident in which only he was injured *held* unauthorized under then-existing Section 316.1933(1), and thus results of scientific test performed on such sample were inadmissible in evidence); *Sambrine v. State*, 386 So.2d 546 (Fla. 1980) (blood sample taken from a lawfully arrested DUI defendant after he refused a breath and blood test unauthorized under the implied consent statutes and thus results of scientific test performed on such sample were inadmissible in evidence); *State v. Burnett*, 536 So.2d 375 (Fla. 2d DCA 1988) (blood sample taken from a defendant who was lawfully arrested for DUI not involving a traffic accident after he was injured in the county jail following his arrest *held* unauthorized by Sections 316.1932(1)(c), 316.1933(1), and thus results of scientific test performed on such sample were inadmissible in evidence); *State v. Prues*, 478 So.2d 1196 (Fla. 4th DCA 1985) (blood sample taken from a defendant arrested for DUI involved in one-car traffic accident in which only the defendant was seriously injured *held* unauthorized under then-existing Section 316.1933(1) and thus results of scientific test performed on such sample were inadmissible in evidence); *McDonald v. State*, 364 So.2d 1241 (Fla. 2d DCA 1978) (blood sample taken from defendant arrested for DUI where defendant objected to the taking of such sample *held* unauthorized under predecessor implied consent statutes and thus results of scientific test performed on such sample were inadmissible in evidence); *State v. Riggins*, 348 So.2d 1209 (Fla. 4th DCA 1977) (same), *cert. dismissed*, 362 So.2d 1056 (Fla. 1978).

[3] The current version of this statute, § 316.1933(1)(c), Fla. Stat. (1993), includes a "licensed practical nurse" among the acceptable blood-withdrawal personnel.

[4] The current version of the statute, § 316.1933(2)(b), Fla. Stat. (1993), places responsibility for approval of chemical analysis methods on "the Department of Law Enforcement."

[5] The current version of the statute, § 316.1934(3), Fla. Stat. (1993), additionally provides that the test or test results are not rendered invalid by "any insubstantial defects concerning the permit issued by the department... ."

[6] *See supra* note 4 (The Department of Law Enforcement now has approval responsibility.).

[7] *See supra* note 2 and accompanying text. at IA3 of this opinion.

725 So.2d 441 (1999)

STATE of Florida, Appellant,

v.

Joe Nathan BROWN, Appellee.

No. 97-2502

District Court of Appeal of Florida, Fifth District.

February 5, 1999.

Robert A. Butterworth, Attorney General, Tallahassee, and Mary G. Jolley, Assistant Attorney General, Daytona Beach, for Appellant.

James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellee.

W. SHARP, J.

The state appeals from the trial court's order, which suppressed Brown's blood alcohol test results[1] in his DUI manslaughter trial.[2]

The trial judge ruled that the police officer who ordered the blood test (Trooper Campbell), lacked probable cause to believe Brown was under the influence of alcoholic beverages at the time of the fatal collision between Brown's car and a bicyclist and thus Brown's blood was not properly taken and tested pursuant to section 316.1933(1). We reverse.

The suppression ruling came at an unusual time during this criminal prosecution, but we do not find that, by itself, is a basis to invalidate it. The motion to suppress was filed two days before the trial began. As the trial was commencing, the defense asked the court to rule on its suppression motion. The trial court observed the motion had been filed late, but went forth with picking the jury. The following day the judge heard the attorney's legal arguments and summaries of what the witnesses would testify about at trial, based on their depositions. He concluded the blood test results would be admitted, and the jury trial began.

During the state's opening statement, counsel said Brown's alcohol test would be placed in evidence and that it showed a level of .12. After hearing the testimony of three state witnesses, the trial judge began to question his ruling on the suppression motion. He excluded the jury and asked the state to proffer Trooper Campbell's testimony.

Campbell testified and was cross-examined by the defense. The court also asked him questions. It then ruled the blood test should be excluded. Because the test had been mentioned in the state's opening statement, the court gave Brown's defense counsel the option of proceeding with the trial with no further mention of the blood test, or granting the defense counsel's motion for a mistrial. The defense expressly waived double jeopardy should the ruling be appealed and overturned. The court declared a mistrial.

The trial judge made the following findings in its order:

> There was no factual basis discernable from the circumstances of the accident or the Defendant's operation of his vehicle prior to the accident upon which a reasonable person could conclude the Defendant was under the influence of an alcoholic beverage at the time of the accident; ..and in addition [the motion is granted] for the reasons and conclusions previously stated in the record.

A copy of part of the trial transcript was attached, which contained the court's findings.

The judge stated he thought there were insufficient facts and circumstances known and available to Trooper Campbell to establish probable cause for him to reasonably conclude Brown was under the influence of alcohol at the time of the accident. He summarized the testimony as follows:

Brown was driving carefully and slowly when he hit a bicyclist traveling in his lane, on a dark night; the bicyclist was wearing dark clothing and his bicycle had no lights or reflectors; the odor of alcohol was detected on Brown's breath; there was a strong odor of alcohol in Brown's car; Brown was not given a roadside sobriety test; Brown admitted to Trooper Campbell he had consumed at least two beers; Brown appeared to be very emotionally upset by the accident; and Trooper Campbell, after ordering the blood test some three to four hours after the accident, did not arrest Brown for DUI, but allowed him to drive away.

At the close of the suppression hearing, the trial judge incorrectly said the Trooper testified he did not see that Brown had blood shot eyes. However, based on the trial transcript, the Trooper actually said: "... his eyes were blood shot."

The trial judge felt there had been little more than the odor of alcohol to establish Brown's impairment plus Brown's admission that he had consumed two beers. That, he felt, was not enough to show Brown was "under the influence" of alcohol.

Further, the trial judge was concerned and troubled by Trooper Campbell's testimony that although he thought he had probable cause to order the blood draw pursuant to section 316.1933(1), he did not think he had probable cause to arrest Brown for DUI. The trooper explained by saying that the case was a "border line" one for a DUI arrest, and if he had simply stopped Brown along the highway, he probably would not have arrested him.

Trooper Campbell also testified he was in doubt about arresting Brown at the accident scene and had telephoned the state attorney's office for advice. He was advised to follow "policy" and await the results of the blood test. He could then make an arrest for DUI.

Section 316.1933(1) provides in pertinent part:

> [I]f a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages ... has caused the death or serious bodily injury of a human being, such person shall submit, upon the request of a law enforcement officer, to a test of the person's blood for the purpose of determining the alcoholic content thereof....

The statute does not define what is meant by "under the influence of alcoholic beverages," nor does it go on and say, as does section 316.193 to the extent that the person's "normal faculties are impaired."

We agree with the trial judge in this case that "under the influence" means something *more* than just having consumed an alcoholic beverage. But it also can mean something *less* than intoxicated. Rodriguez v. State, 694 So.2d 96 (Fla. 3d DCA 1997); Jackson v. State, 456 So.2d 916 (Fla. 1st DCA 1984). "Though all persons intoxicated by the use of alcoholic liquors are under the influence of intoxicating liquors, the reverse of the proposition is not true, for a person may be under the influence of intoxicating liquors without being intoxicated." Cannon v. State, 91 Fla. 214, 107 So. 360, 362 (1926).

> Black's Law Dictionary explains:
>
> "Under the influence"... as used by statutes or ordinances, ... covers not only all well-known and easily recognized conditions and degrees of intoxication, *but any abnormal mental or physical condition* which is the result of indulging in any degree in intoxicating liquors, and *which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess.* Any condition where intoxicating liquor has so far affected the nervous system, brain or muscles of the driver so as *to impair, to an applicable degree, his ability to operate his automobile* in the manner that an ordinary, prudent and cautious man, in full possession of his faculties, using reasonable care, would operate or drive under like conditions. (emphasis supplied).

Black's Law Dictionary 1369 (5th ed.1979).

We agree with the court in Jackson v. State, 456 So.2d 916 (Fla. 1st DCA 1984) that "under the influence" as used by this statute means the driver's normal faculties were "impaired," not simply that the driver had consumed alcohol.

Whether a person has consumed sufficient alcohol to be deemed "under the influence" or impaired to an appreciable degree pursuant to section 316.1933(1) is a judgment call made by a police officer. It must be based on objective facts and circumstances observed by the officer at the time and place of the accident, and reliable information given to the officer by others. Keeton v. State, 525 So.2d 912 (Fla. 2d DCA), *rev. denied,* 534 So.2d 400 (Fla.1988); *Jackson.* Further, Florida courts require that the underlying facts, circumstances and

information be sufficient to allow a person of *reasonable* caution to make the probable cause determination. State v. Cesaretti, 632 So.2d 1105 (Fla. 4th DCA 1994); *Dorman v. State*, 492 So.2d 1160 (Fla. 1st DCA 1986); *Jackson.*

The undisputed facts, circumstances and information known to Trooper Campbell (his observations as well as those of three eyewitnesses he interviewed before ordering the blood draw), establish a reasonable basis for him to conclude Brown was at the time of the accident, under the influence of alcohol to such a degree his normal faculties were impaired. Although witness Tucker, the medical assistant who had been following Brown's car in her own, testified Brown was driving carefully below the speed limit, she also said he was slowing down and speeding up in an unusual manner. She and the other two witnesses (Ricky Hartley and his daughter Christine) all saw Brown's car strike the bicyclist. The impact with Brown's car threw the bicyclist's body up on the hood and windshield and onto the shoulder of the road.

All three testified Brown did not immediately stop. He drove on 500-600 yards, braking two or three times before stopping on the shoulder of the road. During this time, Tucker followed the path of the bicyclist's body and located him lying on the shoulder of the road in the grass (but not hidden). She stopped and shined her lights on the body to prevent anyone running over him again while she used her car telephone to call for help.

Ricky Hartley blocked the road with his truck, to prevent traffic from passing him. He shined his lights on the bicycle, which was in the middle of the road. He was in the process of going over to assist the victim when he saw that Brown had begun backing up along the shoulder of the road where the victim was lying.

The Hartleys and Tucker realized Brown was not going to stop. All yelled and waved to warn him, but Brown's rear wheels ran over the bicyclist's body. When Brown realized he had run over something, he put the car in forward gear, and ran over the body again, finally stopping with the body under the trunk of his car.

Brown then got out of his car and rushed over to the victim. He put his arms around the victim and tried to stand him up. He shook him, saying he was going to be "okay." Tucker and Ricky yelled at him to put the victim down. Ricky had to force Brown away from the victim and keep him away.

The victim was still breathing, but unconscious. He was bleeding from a severe head injury and wheezing as he labored to breathe. Airlifted to a hospital, he died some nine hours later. Tucker, Hartley and Trooper Campbell all smelled alcohol on Brown's breath. Tucker said "you could tell he had been drinking." Christine said she saw Brown throwing something onto the floor board of the passenger side of the car. The car smelled strongly of alcohol.

Brown admitted to Trooper Campbell he had been drinking alcohol. Trooper Campbell testified he thought Brown said he had had two beers. Trooper Campbell stated that Brown's eyes appeared to be blood shot, and that he was behaving in a panicky way. Brown appeared upset by the accident.

Trooper Campbell testified that at the time he ordered the blood draw he had probable cause under the statute based on the circumstances of the accident, Brown's behavior after the accident, the odor of alcohol and his admission he had been drinking. Trooper Campbell said the smell of alcohol was the decisive factor, but not the only one in ordering the test.

In our view, based on these objective, uncontroverted facts and circumstances, we think Trooper Campbell had probable cause to order the blood draw, pursuant to section 316.1933(1). The odor of alcohol on a driver's breath is a critical (if not the only)[3] factor in many cases involving admissibility of a blood test under the statute. *See* State v. Perez, 531 So.2d 961 (Fla.1988); State v. Durden, 655 So.2d 215 (Fla. 1st DCA 1995); *Cesaretti; Keeton; Jackson.* Another factor present in this case was the observation that Brown had blood shot eyes.[4] Indeed the *absence* of the odor of alcohol is critical in suppression cases. White v. State, 492 So.2d 1163 (Fla. 1st DCA 1986).

In many cases, the driver's dangerous or reckless driving which preceded and probably caused the accident, is referenced as an objective fact or circumstances which supports a probable cause determination that the driver's normal faculties were impaired. *See Johnson* (driver had crossed centerline of two-lane highway); *Durden* (driver had crossed center line of highway); *Keeton* (driving 65-100 miles per hour in 45 mile per hour zone, in "slow lane"); *Jackson* (driving at high speed, weaving in and out of traffic lanes).

In this case there was evidence that Brown's behavior was not "normal," and that his rational faculties were impaired. Driving slowly and speeding up and slowing down can also indicate impairment as well as speeding and reckless driving. Brown also did not immediately stop after the accident, as the other drivers did. Further, his behavior in backing up and twice running over the victim's body, in spite of the lights of the other two cars illuminating the accident scene and the witnesses' yelling and waving to stop him, is bizarre behavior and an indicia of impairment.

We are not troubled by Trooper Campbell's testimony that he (subjectively) did not feel he had grounds to arrest Brown for DUI, or that it was "borderline." He may have been mistaken that there is a difference between the two probable cause determinations and we think that he was. However, a police officer's subjective feelings are not the proper criteria. *See Jackson; Dorman.*

Blood tests have been held admissible even if the police officer testified he or she did not have probable cause to order the blood draw, or that he or she had no opinion on that question. *See State v. Silver,* 498 So.2d 580 (Fla. 4th DCA 1986), *rev. denied,* 506 So.2d 1043 (Fla.1987); *Jackson.* However, Trooper Campbell testified he thought he had probable cause to order the blood draw.

The objective facts and circumstances concerning the accident and the driver's behavior are the controlling criteria to look at in these cases. We think they were sufficient in this case to establish probable cause for the blood draw. We hold that the results of Brown's blood test is and should have been admissible at trial under section 316.1933(1).

REVERSED.

GOSHORN and PETERSON, JJ., concur.

[1] Fla. R.App. P. 9.140(c)(1)(B).

[2] §§ 316.193(1), 361.193(a), (b), (c)3. Fla. Stat. (1995).

[3] *Cesaretti: State v. Silver,* 498 So.2d 580 (Fla. 4th DCA 1986), *rev. denied.* 506 So.2d 1043 (Fla. 1987).

[4] *See State v. Johnson,* 695 So.2d 771 (Fla. 5th DCA 1997).

11D-8.004 Department Inspection and Registration of Breath Test Instruments.

(1) The Department shall register and inspect a breath test instrument prior to such instrument being initially placed into evidentiary use by an agency. The inspection validates the instrument approval for evidentiary use, and the registration denotes an instrument approved pursuant to these rules and shall reflect the registration date, the owner of the instrument, the instrument serial number, the manufacturer, and the model designation.

(2) Registered breath test instruments shall be inspected by the Department at least once each calendar year, and must be accessible to the Department for inspection. Any evidentiary breath test instrument returned from an authorized repair facility shall be inspected by the Department prior to being placed in evidentiary use. The inspection validates the instrument approval for evidentiary use.

(3) Department inspections shall be conducted in accordance with Department Inspection Procedures FDLE/ATP Form 35 Rev. August 2005 for the Intoxilyzer 5000 Series, or Department Inspection Procedures Intoxilyzer 8000 FDLE/ATP Form 36 Rev. August 2005 for the Intoxilyzer 8000; and the results reported on FDLE/ATP Form 26 Department Inspection Report Rev. March 2004 for the Intoxilyzer 5000 Series, or FDLE/ATP Form 41 Department Inspection Report Intoxilyzer 8000 Rev. August 2005 for the Intoxilyzer 8000.

(4) Department Inspectors shall be employed by the Department to register evidentiary breath test instruments, to conduct inspections and maintenance of breath test instruments and related equipment and facilities, to conduct and monitor training classes, and to otherwise ensure compliance with Chapter 11D-8, F.A.C.

Specific Authority 316.1932(1)(a)2., (f)1., 322.63(3)(a), 327.352(1)(b)3. FS. Law Implemented 316.1932(1)(b)2., 316.1934(3), 322.63(3)(b), 327.352(1)(e), 327.354(3) FS. History ew 10-31-93, Amended 1-1-97, 7-29-01, 11-5-02, 12-9-04, 3-27-06.

11D-8.006 Agency Inspection of Breath Test Instruments.

(1) Evidentiary breath test instruments shall be inspected by an agency inspector at least once each calendar month. The agency inspection shall be conducted in accordance with Agency Inspection Procedures FDLE/ATP Form 16 Rev. March 2004 for the Intoxilyzer 5000 Series, or Agency Inspection Procedures Intoxilyzer 8000 FDLE/ATP Form 39 Rev. August 2005 for the Intoxilyzer 8000; and the results reported on FDLE/ATP Form 24 Agency Inspection Report Rev. March 2001 for the Intoxilyzer 5000 Series, or FDLE/ATP Form 40 Agency Inspection Report Intoxilyzer 8000 March 2004 for the Intoxilyzer 8000.

(2) Whenever an agency relocates an Intoxilyzer 5000 evidentiary breath test instrument for use at another facility, an agency inspection shall be conducted prior to the instrument removal, and another inspection shall be conducted prior to the instrument use for evidentiary breath testing at the new facility. A mobile testing unit is considered an agency facility.

(3) Whenever an instrument is taken out of evidentiary use, the agency shall conduct an agency inspection. The agency shall also conduct an agency inspection prior to returning an instrument to evidentiary use.

Specific Authority 316.1932(1)(a)2., (f)1., 322.63(3)(a), 327.352(1)(b)3. FS. Law Implemented 316.1932(1)(b)2., 316.1934(3), 322.63(3)(b), 327.352(1)(e), 327.354(3) FS. History ew 10-31-93, Amended 1-1-97, 7-29-01, 11-5-02, 12-9-04, 3-27-06.

11D-8.007 Approved Breath Test Instruments - Access, Facility Requirements, Observation Period, and Operational Procedures.

(1) Evidentiary breath test instruments shall only be accessible to a person issued a valid permit by the Department and to persons authorized by a permit holder. This section does not prohibit agencies from sending an instrument to an authorized repair facility. Only authorized repair facilities are authorized to remove the top cover of an Intoxilyzer 8000 evidentiary breath test instrument.

(2) The instrument will be located in a secured environment which limits access to authorized persons described in subsection (1), and will be kept clean and dry. All breath test facilities, equipment and supplies are subject to inspection by the Department.

(3) The breath test operator, agency inspector, arresting officer, or person designated by the permit holder shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test. This provision shall not be construed to otherwise require an additional twenty (20) minute observation period before the administering of a subsequent sample.

(4) When operating an Intoxilyzer 5000 Series instrument, a breath test operator shall conduct a breath test in accordance with, and shall record the results on, the Breath Test Results Affidavit FDLE/ATP Form 14 Rev. March 2002. When operating an Intoxilyzer 8000 instrument, a breath test operator shall conduct a breath test in accordance with Operational Procedures Intoxilyzer 8000 FDLE/ATP Form 37 Rev. August 2005, and the results of the test shall be recorded on the Breath Alcohol Test Affidavit Intoxilyzer 8000 FDLE/ATP Form 38 March 2004.

(5) Each agency shall record all breath tests conducted on a particular Intoxilyzer 5000 Series evidentiary breath test instrument on the Breath Test Log FDLE/ATP Form 13 Effective January 1997. The breath test log shall be reviewed each calendar month by an agency inspector to ensure that the information is properly recorded and that all necessary corrections are made. The agency inspector signature on the breath test log shall signify compliance with this section.

Specific Authority 316.1932(1)(a)2., (f)1., 322.63(3)(a), 327.352(1)(b)3. FS. Law Implemented 316.1932(1)(b)2., 316.1934(3), 322.63(3)(b), 327.352(1)(e), 327.354(3) FS. History ew 10-31-93, Amended 1-1-97, 7-29-01, 11-5-02, 12-9-04, 3-27-06.

REFUSALS, ISSUES AND CREATIVE DEFENSES IN DUI CASES

By

Michael A. Catalano, Esq., Miami

2013 Masters of DUI

Hyatt Regency Downtown Miami
February 22, 2013

REFUSALS AND THE LAW-YOU HAVE A RIGHT TO BE CONFUSED…I AM.

Presented by:

Michael A. Catalano, Esq.
MICHAEL A. CATALANO, P.A.
1531 N.W. 13 Court
Miami, FL 33125
305-325-9818, Fax 305-325-8759
Email: MCatalanoLaw@gmail.com
MichaelACatalanoPA.com

Reading or refusal: The game plan needs to be established the minute you meet the client.

The typical and atypical DUI case:

THE RULE: Have a **game plan** and stick with it from pre-trial preparation, through the first part of voir dire to the end of closing argument.

Do NOT assume they will give you a great plea offer JUST BECAUSE the BAC is under .08…. get ready for a fight.

Special notes about refusal cases at DHSMV and court:

A. Did client really intentionally refuse or was just **unable** to give breath or urine?

What exactly did client say? Does client have lung problems and was unable to give sample or was client just playing games with machine? Look at the FDLE web site for volume of air that was presented in breath refusal cases. Trust me, I know lung problems. Did client have recent PFT test? (Pulmonary Function Tests). See bashful kidney cases. Ask jurors about people who are "pee shy." *Wolok v. Mellon*, 1 Fla. L.W. Supp. 204 (Fla. 11th Cir. 1992)(attached in appendix), *Dorman v. Comm*., 582 A. 2d 473 (Conn. Super. 1990) and many others. Trick: Just run "Wolok" in Fla. L. W. Supp and you will find most cases on this subject. See appendix on refusal materials.

B. **<u>What exactly did they read to client</u>** or tell client would happen if client refused. In south Florida, the implied consent forms are all over the place. It is not a refusal if the police gave bad advice or demanded things they had no right to demand. See, *Trauth/Clark/Whitehead/Martin* and others but, remember, this will all be decided by the Florida Supreme Court in the Susan Nader case that is pending as of 8/23/11.

C. **<u>Why did client refuse?</u>** Ask the client. Most will say they don't trust the machines or that they heard something about them being unfair. Ethically, you can help out by showing them all about Sandra Viega the FDLE inspector who was accused of destroying intoxilizer data and fired and other stories about problems with breath machines but, you cannot put words in their mouths.

D. **<u>Did client recant?</u>** As in joke telling, timing is everything here. If client is still in the room and it is no big deal to do a breath test, then officers should allow client to recant. If client changes mind two hours later at the jail, it is too late. The cases in between are the interesting ones. *Larmer v.DHSMV*, 522 So.2d 941 (Fla. 4th DCA 1988), and *Nicolucci v. DHSMV*, 3 Fla. L. W. Supp. 606 (Fla. 7th Cir. 1995). (In appendix attached)

E. **<u>DHSMV and timing issues.</u>** Look at the timing. It must be in this order.

i. Valid stop
ii. Valid reason to investigate and ask for FSE's.
iii. Valid PC for DUI arrest. (Actually, any arrest for anything is good enough but, cop must arrest first and then demand a breath test.
iv. Proper reading of implied consent warnings.
v. Intentional refusal.
vi. No recantation.
vii. On 2nd refusal, must also be told exactly what will happen if they refuse per F.S. 316.1939. (See next section)

When times are all screwed up, show hearing officer that it makes no sense and that there must be an arrest before a request for breath test under penalty of a suspension. *DHSMV v. Trimble*, 821 So. 2d 1084 (Fla. 1st DCA 2002) and *DHSMV v. Garcia*, 935 So. 2d 542 (Fla. 3rd DCA 2006).

Make it easy to show hearing officer the problems with the times. Here is a sample memo to DHSMV about a case with time screw ups:

Date: **2/6/13**

To: **_____ File at DHSMV**

From: **Michael A. Catalano, P.A.**
Attorney at Law
1531 N.W. 13 Court
Miami, FL 33125
305-325-9818
Fax 305-325-8759
Email: MCatalanoLaw@gmail.com
Web: MichaelACatalanoPA.com

Re: State v. _____
Case No.: DUI= _____

Subject: Time Issues

Sworn Arrest report:
4:01 am stop
4:22 am arrest

Sworn Refusal affidavit:
4:01 am arrest
4:01 am request for breath test

Sworn Breath Affidavit:
5:01 am refused

Unsworn DUI Test Report:
4:22 am arrest

Unsworn Implied Consent Form:
4:34 am Read IC form

F. Second Refusal Implied Consent Warnings are frequently wrong.

Look carefully at F.S. 316.1939. It is very specific in what must be told to a person to sustain a second refusal.

i. Must be first arrested for DUI. (not just any arrest)
ii. Must be told of 12 month and 18 month suspension possibilities.
iii. If previously refused "is a misdemeanor." (Not an "offense" or "crime" or "infraction" or you some bad Spanish translation for misdemeanor.
iv. Refuses after being told by a real cop and not a PSA or CSA.

v. Commits a misdemeanor.

Even if the cop means well and simply screwed up with the IC warnings, exclusion of evidence is warranted. *State v. Bello*, 18 Fla. L. W. Supp. 305 (Fla. Miami-Dade County Court, Judge Schwartz Dec. 10, 2010)(copy in appendix)

I. Pre-Trial Strategy

A. Meeting with the client

DUI cases are truly an "all or nothing" situation for the client. If you win, the client is happy and no matter what happens with the implied consent hearing, if any, or any accompanying infractions, the client feels that he or she "got their money's worth." If you lose, the client ends up sitting in DUI school with all those other people who lost whether or not they hired an attorney. It is therefore important to educate the client by stressing right from the first meeting that if convicted, he or she may get the same or a worse sentence than some unrepresented person got for simply pleading guilty at arraignment.

Explain all of the ramifications, (include increased car insurance premiums and recidivist sentencing provisions of Florida law), so that your client knows "up front" the importance of going to trial. At the first meeting with the new client also let the client know that a jury trial may be the only way he or she can leave court without being convicted.

Too many clients feel that a DUI case is something that should be simply left the attorney to handle. It is best to have the client intimately involved with the defense **game-plan** from the outset. Let the client know that you and he or she must be prepared to go to trial if it is in his or her best interest.

B. Get the Client involved

There are many pre-trial concerns that should be handled by the defense attorney with the client's help, such as:

1. Have the client photograph the arrest area and the locations where any physical tests were performed. Do a video if it will help.

2. Have the client assist in locating and interviewing potential witnesses.

3. Examine the car in question. Photograph the car and any of its parts that may affect or relate to potential issues at trial. Have photos taken to corroborate as much defense testimony as possible. For example, if the age and mileage of the car are at issue, photograph the odometer and the license plate.

4. Get medical information about the client. Use a medical history checklist. If the client has medical problems that might affect his or her performance on physical tests, speak with the client's doctor and get medical records to back it up. Be ready to demonstrate in open court, that your client is telling the truth. The best and cheapest way to prove up medical problems is by introducing medical records via the record's custodian. (Make sure they don't mention alcohol issues!)

5. Be careful how you handle the issue of prescription or "over the counter" drugs that the client may have been taking at the time of the arrest. The first questions that should be addressed is, "Is the drug an enumerated drug covered by Section 316.193 or Chapter 893 of the Florida Statutes?" There is a long list of drugs in those chapters. Find out if the drug your client was taking is listed in the Statutes. Be sure to check for the drug under the appropriate generic, medical name used in the statutory chapters enumerated above . If not, is the drug covered in sec. 877.111 Florida Statute? Believe it or not, driving under the influence of fiberglass resin (methyl ethyl ketone) is illegal under Fla. Stat. 877.111. The statute also has a "catch all" phrase to cover non-listed drugs or substances. The phrase reads, "or any other similar substance for the purpose of inducing a condition of intoxication or which distorts or disturbs the auditory, visual, or mental processes." Sec. 877.111 (1) Florida Statutes. I suggest you run all drugs by an expert before you disclose anything.

Look up the drug in the (P.D.R.), (Physicians Desk Reference) and see what its side affects are and how it interacts with alcohol. I also use the Consumer Reports Drug Book. You can also simply go to the official web site for the drug in question and get the information right from the manufacturer. Most clients think that they can drive under the influence of any drug as long as it was prescribed by a physician. Don't let your client take the stand if he has to admit that he violated the law by driving under the influence of a drug or substance unless you are absolutely sure that it is not listed.

If the client is taking prescription drugs, get a copy of the vial, and a complete copy of ALL medical records. Do not disclose this to the prosecution until AFTER you have evaluated the medical reports and if some are from emergency rooms or hospitals, have a nurse read them and translate what they are saying. Be careful for notes about “alcohol abuse or “drug abuse.

6. Get a copy of the videotape, if one exists, and show it to the client before any depositions are taken. It's amazing how much a client will remember once he or she sees himself or herself on the videotape. Have the client explain to you what was happening in the videotape room. Even though the police have routine procedures, they rarely follow them "word for word".

7. If there's a breath/alcohol reading, know everything possible about the client's medical history concerning his lungs and digestive system so that you can show the jury that your client has medical problems that resulted in an inaccurate reading. Lung cancer, HIV and other problems and taking modern

medicines to correct those problems may have an effect on the reading. Gastric surgery has been liked to crazy BAC levels.

8. If the case involves refusal of consent to take the breath test, discuss with your client why he or she refused. Tell him or her reasons why other defendants have also refused to give breath samples. Most of the Defendants who refuse to give a breath sample have some reason such as, "I've heard that they are unreliable"... tell the client why his or her reason(s) have validity.

9. If your client swears that he only had "a few beers" or something similar, try to get credit card receipts or other documentation to prove that he is telling the truth.

C. Know what you're up against!

1. Civilian Witnesses. Learn all you can about your client's accusers. Try to get permission to depose all state witnesses before trial, if you can. Rule 3.220, Fla. R. Crim.P. has limitations on the taking of depositions.

It is tough to know a lot about the case before trial unless you reach out to the witnesses and ask them what happened. Write to and call civilian witnesses on the phone and ask them what happened. Tell them all about the DUI law. Most people don't know how much your client could legally drink before he or she drove his car. Let them know the serious ramifications of a DUI conviction. Explain the heavy burden the State has to meet before your client can be convicted of a crime such as DUI. Answer their questions.

If the civilians tell you facts that you want to preserve, ask them for permission to tape record their statement over the phone. Make sure they again consent to being tape recorded at the beginning of the tape recording. (It's a felony to tape without permission and you can not use it for any purpose).

In DUI accident cases, the perspective of a civilian witness will often be molded by the witness(es) initial meeting or conversation with counsel for one of the parties. It is important to attempt to contact the witness prior to contact by opposing counsel. Witnesses will be more cooperative if they perceive you as friendly and feel that you are approachable. Even under the worst fact pattern, you can still have a good relationship with an adverse witness. If they tell you that the young and [stupid] prosecutor told them not to speak with you, ask them to say just that on tape and take it to the judge. That is a serious violation of Rule 3.220.

If the civilian witnesses were involved in the charged accident, ask them if there is anything you can do to help them settle the civil aspects of the case. Most civilian witnesses need help with the insurance aspects of the case. Try to guide them, within ethical bounds. Sometimes it is even wise to apologize on behalf of your client for causing the accident. Many "accident victims" only want to hear that they were "clearly not at fault" and that someone says…"I'm sorry." Once they hear that they were not at fault, they will not try so hard to "stretch the facts" to help convict your client. If they have a civil attorney, contact him or her and try to work

with him or her to settle the civil aspects of the case. Be sure to make it clear to the witnesses that you cannot represent them and that your first loyalty is to your client. Make sure you don't ask them to do anything improper in exchange for their testimony. DO NOT AGREE TO SETTLE WITH ANYTHING that could even look like a deal to keep them from testifying in the criminal case. There is nothing unethical about talking with the State's witnesses. You can get in big Florida Bar trouble for making any offer that looks like you are trying to "buy" justice. See *Bar v. Machin*, 635 So. 2d 938 (Fla. 1994). (attached to these materials).

2. Police and State Experts.

Even if you are denied a deposition of the officers, you can still try to talk with them about the case. Many officers will tell you about the case if they feel you are not a threat to them or their job. Try to catch them in the courthouse hallway or on the street. Don't try to take a tape recorded statement of a police officer. Do try to get them to tell you what they did in the case.

State chemists and alcohol experts vary greatly in their training and knowledge. On one end of the spectrum, a breath device operator may only know how to run the machine properly. That witness will deny any scientific knowledge about alcohol and how it affects the human body.

On the other end, the witness may be highly trained and scientifically knowledgeable. Regardless of where the state's expert fits on the spectrum, you should know that witnesses prior testimony and be prepared to cross examine him or her. Make sure you check every document he supplies you to see if the testing in your case was done "substantially in accordance with H.R.S./F.D.L.E rules and regulations."

3. Hire the right experts. You may just keep the State from getting to them.

4. They can test blood later for marijuana. Be careful. You may not like what you find out if you complain too much.

EFFECTIVE PRETRIAL MOTIONS:

II. Pretrial Motions

It is important to note that you must make every possible pretrial motion to suppress or dismiss unless you don't want to "tip your hand" to the state about an error they had overlooked so far. A motion to suppress or exclude should not be filed if you think that the State has missed the error and, by your disclosure, they can correct the error before trial.)

On the other hand, try to argue your technical suppression issues *before* trial. During the trial, you can object "pursuant to the issues raised pre-trial". Juries

wonder why you spend so much time at "side bar" and no matter what you say to the judge, the evidence is allowed to be introduced. Minimize the amount of time you have to spend during the trial, arguing legal issues. Let the jury think that you are winning on most of your legal points. Juries like to think they voted the same way the judge would have voted.

Consider not moving to suppress a BAC under .08. Juries wonder why someone is on trial with such a low reading.

If your client looks less than impaired on the videotape, you want the judge to see it before the jury trial. In close calls on legal issues during the trial, many judges will lean toward the side they think should be victorious.

Kinda serious injuries to victims? Consider a sworn motion to reduce. Attached is an example. See *State v. Schreiber*, 835 So. 2d 344 (Fla. 4th DCA 2003). (Attached to these materials)

Sample motions to suppress/reduce are attached to these materials.

Areas for motions in liminie:

1. Cop can not say pass or fail.

2. Cop can not say he only arrests some of those he tests: *McKeown, v. State*, 34 Fla. L. W. D1689 (Fla. 4th DCA Aug. 19, 2009).

3. HGN not admissible or limit its damage.

4. ASA can not argue that impairment means “diminished” or “weakened” faculties. *Shaw v. State*, 783 So. 2d 1097 (Fla. 5th DCA 2001).

5. ASA can not comment on demand for attorney or silence. Watch out for video’s where questions are asked and client simply stays silent.

6. Breath test admissibility. (Covered by other speakers at this seminar)

7. *Clark/Trauth/Llamas* issues. What exactly did the cop say to your client to get him or her to blow or give blood or urine. Use this quote in *DHSMV v. Clark,* 974 So. 2d 416 (Fla. 4th DCA 2007):

> The state acknowledges, but attempts to minimize the error in the warning given Clark in this case; however, the error may have misled Clark into thinking that she would have to submit to a more invasive test, the withdrawal of blood, than was authorized by the statute. We accordingly conclude that the circuit court did not depart from the essential

requirements of law in holding that, where the officer's warning did not comply with the statute, Clark's license could not be suspended under the statute. Keep in mind that all of this is affected by Susan Nader case from the Florida Supreme Court.

8. Urine is useless and results not valid.

9. In Felony 3rd , attack priors. Did client have a lawyer on prior cases?

10. Hearsay, object to documents that prove up machine.

III. Bench or Jury...A big decision! (If they even go bench in your town)

Whether or not to waive a jury trial in lieu of a bench trial is probably the single most important decision you and your client will make. Make sure your client knows all the reasons why one form of trial might be better than the other. Clients don't like to be told that they should go bench because the judge is an old friend and wouldn't harm his client. Those comments can get you in trouble if your client is convicted by the judge, despite your old friendship.

If your client has made a refusal and the videotape is favorable, it may be a good idea to proceed to a bench trial. Cases involving high blood alcohol level readings (for example, .12 and above), should usually be taken to a jury trial, as most judges are reluctant to acquit at bench trials. Most judges are afraid to acquit a defendant with a high reading even if they have a reasonable doubt. Remind a judge during a bench trial that he should view the facts using the same standards that would apply to a jury. The judge should be reminded that his verdict must be not guilty if he has any reasonable grounds for a doubt as to the guilt of the accused. Tell the judge that even if he thinks the Defendant may be guilty, he must acquitted because there is a reasonable doubt.

In deciding whether or not to waive jury, the most important consideration is how the judge has ruled in the past. If you don't know the judge well, ask other lawyers, clerks, court reporters and bailiffs who do. Ask them how they think the judge will handle a bench trial as opposed to a jury trial. Hopefully they will tell you what they think.

Remind the client that you can not guarantee a favorable result in either a bench or jury trial. Sometimes you have to follow your heart and make a risky decision. If in doubt, go jury!

IV Voir Dire

The GAME PLAN starts here. It is your theory of the case. Typically it is a game plan of not enough evidence to convict or a reasonable doubt. Juries are going to assume your client was drinking. Focus them right from the beginning that

the real issue is how impaired the client is or is not. Other than special areas of interest that are relevant to the case at bar, there are some areas that must be explored in every DUI trial.

1. How alcohol (or drugs) has affected the juror's life. Prior DUI, alcohol or drug arrests of the juror or anyone the juror knows, what happened to the case? If it was a recent local DUI arrest, get the juror to talk about the ramifications of the conviction and punishment. Alcohol and drugs are hot topics of conversation. Find out how each juror feels about the subject...in detail.

a. MADD or SADD member?

b. Friend or relative hurt or killed by a DUI anywhere?

c. See TV shows or read about DUI's?

d. What they know about Florida's DUI law?

2. Let the jurors know that DUI is a crime of "degree" and that not all drinkers are guilty just because they drive a car thereafter. Some jurors think that drinking any amount of alcohol and driving means that the Defendant is guilty. Get the jurors to agree that they will follow the judge's instructions on how much the Defendant could drink before he breaks the Florida DUI law and becomes a "criminal" in the eyes of the law.

At the same time, discuss the reasonable doubt standard and how it should be used in a DUI case.

Make sure you ask questions that cover your "theme" or "**game plan**" for the trial.

V. Opening Statement

In opening statement, tell the jury what your theory or **game plan** will be during the trial. Do it soon… do not wait. In most DUI cases, there is no doubt that the Defendant drank something. Here are some typical defense game plans for DUI cases:

l. He drank, but not enough to violate the law.

2. His normal faculties were not impaired from alcohol alone. Other outside influences affected his normal faculties, such as sickness, lack of sleep, or age. The State has to prove that the alcohol, alone affected your client, to the extent that he lost control of all of his normal faculties.

3. If the State mentions the breath reading, tell the jury why the breath reading is not an accurate indicator of the client's blood alcohol at the time he was behind the wheel.

4. If the State mentions a blood reading, give the jury some information about why the blood reading was not properly taken and/or analyzed.

5. If your client looks and acts drunk on the video, explain to the jury that if any one normal faculty was not impaired from alcohol ingestion alone, they must acquit him.

6. Give reasons why your client didn't drive his car in a "perfect" manner.

7. Remind the jury that you can not present "your side" of the case until after the State rests. Ask them to keep their minds open.

VI. The Trial

FUNDAMENTAL RULES

A. Call it "drunk driving" and not "impaired driving".

B. Never call your client a "Defendant" in front of a jury.

C. Act positive and give the jury the feeling that you too are there to "seek justice" and not just to "get the client off".

D. **Never** waive opening statement.

E. Show as many diagrams and photographs as possible to prove your points.

F. Let the jury know that the judge can punish your client on the infractions and implied consent hearing, in any, whether or not they find your client guilty. (Jurors have told me that they were close to convicting but, figured that the judge would "hammer" the client on the infractions and the client "already" lost his license so, they let him or her "go."

G. Remind the jury that this is a serious charge, otherwise there would not be the right to a full blown jury trial. This is not "traffic ticket court".

MOST IMPORTANT OF ALL...

H. Follow your theme or **game plan**. Your presentation at each stage of the trial should work toward the theme or game plan.

Here are some ideas or concepts that may help during the trial:

l. Refusal cases. Tell the jury ***why*** your client refused. Steal the prosecutor's thunder by explaining the perfectly plausible reason your client had for not giving a breath sample.

Get the witnesses to admit that there were some, if not all of the client's "normal faculties" that were not impaired solely from the ingestion of alcohol. If your client looks good on the videotape, get the witnesses to admit that your client really didn't change his level of intoxication from the arrest scene to the video scene a short period later. If the witnesses say your client "sobered up" greatly, discuss the small amount of alcohol that can be absorbed during the period of time it took to get your client before the video camera.

2. Actual Physical Control Cases. The "actual physical control" law is frequently misused by prosecutors. The intent of the law was to help prosecute defendants who are involved in accidents and there is no witness available to prove that the defendant was driving drunk. The way the jury instruction reads, any "drunk" who has exclusive control over a car should be convicted.

Politely take your keys out of your pocket and throw them on the table in front of the jury. Tell them why you should not be convicted, if you were drunk, for being in actual physical control merely because you have the keys to a car that is in a parking lot somewhere else.

3. In cases with a breath reading.

a. Over .08: Ask one big question: Officer, what exactly was my client's reading when you stopped him or her? Go "bowling for error factors". Show the jury the "bowling sheets", otherwise known as the "log sheets". Show them how often the "machine" makes mistakes.

Keep calling it a machine, not a "scientific instrument". BRING AN EXPERT to explain the machine's faults. Never call that "thing" an "instrument." Call it a "machine."

b. Under .08: Do not underestimate such a case. There are jurors who would convict a ham sandwich.

4. Catch the officers in a lie. Read your citations carefully. Frequently, the arresting officer "certifies" on the face of the uniform traffic citation that the infraction of "failure the remain in a single lane" was committed at the following place... If you look and listen carefully, the officer certifies that your client committed an infraction <u>at the location of the traffic stop</u>. Jurors know that peoples lives, and insurance rates, are greatly affected by what a officer writes on a ticket. Show that what the officer wrote on the ticket is not so.

5. Break the law down to its basic parts and show why each part must be violated in order to obtain a conviction.

a. **Driving:** Unless someone testifies that they saw your client driving, don't admit it. The witness who can put your client "behind the wheel" may not be available and you don't want to stipulate or agree to anything.

b. **While under the influence of alcohol and/or drugs:**

Everyone who drinks *any* amount of alcohol and thereafter drives a car is "under the influence of alcohol". Usually, its best to admit that your client was "under the influence". That shifts the main issue to the difficult fact to prove, i.e. that your client was under the influence to a certain extent.

c. **To the extent that his normal faculties were impaired:**

The statute says "faculties" in the plural. Tell the jury that the State must prove that all of your client's normal faculties must have
been impaired solely from the ingestion of alcohol. If the State fails to prove any single element, they must find your client not guilty.

d. **In a certain county, in the state of Florida:**

Again, don't waive anything. The State may forget to prove venue and jurisdiction. Oooops.. JOA!

6. How to handle Physical Sobriety Tests:

Standard police physical sobriety tests only test "**abnormal**" faculties.

Your client is charged with driving under the influence to the extent that it affected his or her **NORMAL** faculties. Ask the officer if it is normal for people to walk heel to toe or touch finger to nose. Ask him if he does those physical tests at the dinner table at his house.

Show the jury how demanding the officer was when he asked your client to touch his finger to his nose. Show the jury how easy it is to fail the tests in the officer's opinion.

Remember, these are the only tests your client will ever take in his life where he can not practice and if he fails, he gets a free trip to jail. Paint a picture for the jury of your client, nervous and afraid, standing next to an armed police officer, police lights flashing, people staring at him and all of a sudden, it's his turn to perform the tests or go to jail. Even a trained actor would have trouble under those circumstances.

CLOSING ARGUMENT:
Last but not least, even if the client gets convicted, hold your head up high because you did everything possible to protect his rights under our system of justice!

Appendix to Materials:

ETHICS:

If you only have time to read one single ethics case, read this one:

Supreme Court of Florida.
THE FLORIDA **BAR**, Complainant,
v.
Manuel A. **MACHIN**, Respondent.
No. 79369.
April 21, 1994.

In disciplinary proceeding, the Supreme Court held that offer on behalf of client to set up trust fund for one victim's child if victim and other victim's family do not speak in aggravation at client's sentencing hearing is conduct prejudicial to administration of justice and warrants 90-day suspension.
So ordered.

West Headnotes

[1] KeyCite Notes

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k58 k. Punishment. Most Cited Cases

Offer on behalf of client to set up trust fund for one victim's child if victim and other victim's family do not speak in aggravation at client's sentencing hearing is conduct prejudicial to administration of justice and warrants 90-day suspension. West's F.S.A. Bar Rules 3-4.3, 4-8.4(d).

[2] KeyCite Notes

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(2) k. Standards, Canons, or Codes of Conduct. Most Cited Cases

When confronted with possible ethical conflicts, it is lawyer's obligation to look to rules of professional conduct and discipline for guidance.

***939** John F. Harkness, Jr., Executive Director, and John T. Berry, Staff Counsel, Tallahassee, and Susan V. Bloemendaal, Asst. Staff Counsel, Tampa, for complainant.
Donald A. Smith, Jr. of Smith and Tozian, P.A., Tampa, for respondent.

PER CURIAM.
Both The Florida **Bar** and the respondent seek review of the referee's report in this attorney-disciplinary action. We have jurisdiction [FN1] and adopt the referee's recommendations as to guilt and discipline.
FN1. Art. V, § 15, Fla. Const.

The **Bar** filed a two count complaint against the respondent, Manuel A. **Machin**. We accept the referee's recommendation that **Machin** be found not guilty of the violations alleged in count I of the complaint. Thus, we are concerned here only with the allegations contained in count II.
In count II, the **Bar** alleges violation of the following Rules Regulating The Florida **Bar**: 3-4.3 (the commission by a lawyer of any act that is unlawful or contrary to honesty and justice); 4-3.4(f) (a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party); and 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). The alleged violations occurred during Machin's representation of Nelson Gonzalez.

Gonzalez had been charged with the first-degree murder of Samuel Sierra and the kidnapping of Sierra's girlfriend, Susan Schultz. At the time of the murder, Ms. Schultz was pregnant with Sierra's child. As part of a plea agreement, Gonzalez pled guilty to second-degree murder. At various times prior to the sentencing hearing, Machin offered, on behalf of his client, to set up a trust fund for Ms. Schultz's child in amounts up to $30,000. The trust fund would be set up for the child only if Ms. Schultz and Sierra's family did not speak in aggravation at Gonzalez's sentencing hearing. Machin feared that if the victim's family spoke in aggravation, the sentencing judge would impose a more severe sentence or reject the plea agreement entirely. It appears the offer was disclosed to the State Attorney's office, the sheriff's office, and the victim's assistance representative. It also appears that the sentencing judge was made aware of the terms of the trust offer. The victim's family rejected the offer, instead choosing to testify in aggravation. After hearing from the victim's family, the sentencing judge imposed the maximum sentence that could have been imposed without rejecting the plea agreement.

[1] The referee found only that portion of rule 3-4.3 relating to conduct prejudicial to the administration of justice and rule 4-8.4(d), which expressly prohibits such conduct, had been violated. In connection with these ethical violations, the referee recommends that **Machin** be suspended from the practice of law for ninety days.

The **Bar** seeks review of the recommended discipline and asks that **Machin** be suspended from the practice of law for six months. **Machin** challenges the referee's finding of guilt and the recommended ninety-day suspension. He takes the position that the **Bar** failed to prove his actions were prejudicial to the administration of justice. In the alternative, he argues that if the Court accepts the referee's finding of guilt, an admonishment is an adequate sanction.

We adopt the referee's finding of guilt and agree that "[a] lawyer who tries to buy a victim's silence at sentencing prejudices the administration of justice." The fact that the sentencing proceedings do not appear to have been affected by Machin's unsuccessful attempt to buy silence does not preclude a finding of guilt. If a showing that a particular judicial proceeding was affected by an attorney's conduct were required in a case such as this, a violation of rule 4-8.4(d) would hinge on the actions of third parties. While conduct that actually affects a given proceeding ***940** may be prejudicial to the administration of justice, conduct that prejudices our system of justice as a whole also is encompassed by rule 4-8.4(d). This conclusion is supported by the Standards for Imposing Lawyer Sanctions, which makes clear that harm to our legal system is a concern the rules were designed to address. *See, e.g.,* Introduction, Standards for Imposing Lawyer Sanctions ("injury" includes harm to the legal system).

The fact that the victim's family refused the trust offer may be considered in determining the extent of the harm caused by Machin's misconduct, when considering the sanction that should be imposed. *See* Standards for Imposing Lawyer Sanctions 3.0(c) & 6.1 (both potential and actual injury caused by conduct that is prejudicial to the administration of justice should be considered in imposing sanction). However, Machin cannot use the victim's family's refusal to accept his proposal as a shield from responsibility for his actions. It is the mere attempt to influence the sentencing determination by buying the silence of the victim's family that prejudices the administration of justice. It is not necessary that the attempt be successful because each time such an attempt is made, confidence in the legal system is lost.

As noted by the referee, the fair and proper administration of justice requires that the rich and the poor receive equal treatment before the court. A wealthy defendant cannot be allowed to buy silence and thereby gain a chance at a lesser sentence than that received by one unable to pay for silence. This is so because when “justice” can be bought by the highest bidder, there is no justice. An attorney's involvement in the transaction only serves to accentuate the prejudicial effect on the system. When one charged with the special responsibility of upholding the quality of justice attempts to buy a more favorable sentence for a criminal defendant, doubt is cast on our entire system of justice.

[2] Machin's conduct in this case is so obviously prejudicial to the administration of justice, we find it hard to believe that he claims ignorance of the impropriety of the trust offer simply because he was unable to find authority addressing the precise situation with which he was confronted. We take this opportunity to emphasize that when an attorney recognizes a certain course of conduct may have ethical implications, the fact that there is no precedent directly on point should not be considered authorization to engage in the questionable activity. As Machin notes, the Preamble to the Rules of Professional Conduct recognizes ethical problems may arise from conflicts between a lawyer's responsibility to a client and the lawyer's special obligations to society and the legal system. However, the Preamble goes on to provide:

The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

When confronted with possible ethical conflicts, it is the lawyer's obligation to look to the rules of professional conduct and discipline for guidance. While it always may not be clear that a specific course of conduct is proscribed by the rules, an attorney must use sound judgment in applying these ethical standards to a given set of facts.[FN2] **Machin's** judgment clearly was lacking in this instance.

FN2. An attorney with concerns about contemplated professional conduct also may request an ethics opinion from The Florida **Bar**. *See* Rule Regulating The Florida **Bar** 2-9.4 ; Florida **Bar** Procedures for Ruling on Questions of Ethics.

We agree with the **Bar** that **Machin** is guilty of serious misconduct. However, we believe the ninety-day suspension recommended by the referee is sufficient. **Machin** has no prior disciplinary record. He has a reputation for zealously representing his clients and for making many worthwhile contributions to his family, his church, and his community.

Moreover, there is evidence that **Machin** disclosed the trust offer to the State Attorney's office, the sentencing judge, and others in the legal community; but no one except the victim's mother objected to or questioned ***941** the propriety of the offer. There also is testimony that payment of money, unrelated to restitution or fines, in criminal cases is not unheard of in the legal community in which **Machin** practices. The approval or acquiescence of others and the alleged occurrence of similar unethical conduct does not absolve **Machin** of responsibility for his actions. However, we agree with the referee that these factors must be considered in mitigation because they tend to explain why **Machin** may not have fully comprehended the impropriety of the trust

offer. Under the circumstances, we feel certain a ninety-day suspension is an adequate sanction to punish **Machin's** breach of ethics, to encourage his rehabilitation, and to discourage others from engaging in similar misconduct. *The Florida **Bar** v. Pahules*, 233 So.2d 130, 132 (Fla.1970). Accordingly, Manuel A. **Machin** is suspended from the practice of law for a period of ninety days. The suspension shall be effective thirty days from the filing of this opinion, thus giving **Machin** time to close out his practice and protect the interests of his clients. **Machin** shall accept no new business from the date of this opinion. If **Machin** notifies this Court in writing that he is no longer practicing law and therefore does not need the thirty days to close out his practice, this Court will enter an order making the suspension effective immediately. Judgment is entered against Machin for costs in the amount of $2,701.39, for which sum let execution issue.
It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.
Fla.,1994.
The Florida Bar v. Machin
635 So.2d 938, 19 Fla. L. Weekly S238, 62 USLW 2706

SERIOUS BODILY INJURY:

District Court of Appeal of Florida,
Fourth District.
STATE of Florida, Appellant,
v.
Jennifer **SCHREIBER**, Appellee.
No. 4D01-2892.
Jan. 22, 2003.

Defendant in prosecution for driving under the influence of alcohol (DUI) moved to suppress results of blood tests. The County Court, Seventeenth Judicial Circuit, Broward County, Fred J. Berman, J., ordered those results suppressed and certified question of great public importance. State appealed. On motion for rehearing, the District Court of Appeal, Polen, C.J., held that: (1) standard DUI instruction does not improperly instruct on implied consent presumption of impairment; (2) defendant's consent to blood test was not voluntary; and (3) police officer lacked authority to compel blood test.
Certified question answered; judgment affirmed in part, reversed in part, and remanded.

West Headnotes

[1] KeyCite Notes

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak357 k. Instructions. Most Cited Cases

Standard instruction in prosecution for driving under the influence of alcohol (DUI), which includes both the impairment theory and the unlawful blood alcohol theory, does not improperly instruct jury on a presumption of impairment based on test results obtained under implied consent law; jury can be instructed on unlawful blood alcohol theory absent proof of any impairment, provided blood test results have been introduced via the predicate established in *Robertson v. State*. West's F.S.A. §§ 316.1932-316.1934.

[2] KeyCite Notes

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak421 k. Advice or Warnings; Presence of Counsel. Most Cited Cases

Defendant's consent to blood-alcohol test was not knowing and voluntary under totality of the circumstances.

[3] KeyCite Notes

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; Necessity for Arrest. Most Cited Cases

Police officer lacked authority to compel defendant's blood test under statute conferring such authority when there is probable cause to believe that a person driving under influence of alcohol (DUI) has caused serious bodily injury or death, where the only injury resulting from accident in which defendant's car struck tree on median was defendant's two fractured ankles, from which she fully recovered. West's F.S.A. § 316.1933(1).

West Codenotes

Validity Called into Doubt

West's F.S.A. § 316.1934

***344** Charlie Crist, Attorney General, Tallahassee, and Richard Valuntas, Assistant ***345** Attorney General, West Palm Beach, for appellant.
Lawrence C. Roberts, Fort Lauderdale, for appellee.

ON MOTION FOR REHEARING

POLEN, C.J.
We withdraw our previously filed opinion dated November 20, 2002 and replace it with the following.

[1] The county court has certified the following question of great public importance to this court pursuant to Florida Rule of Appellate Procedure 9.160(b):

DOES THE STANDARD DUI JURY INSTRUCTION, WHICH INCLUDES BOTH THE IMPAIRMENT THEORY AND THE UNLAWFUL BLOOD ALCOHOL THEORY, HAVE THE EFFECT OF GIVING AN INSTRUCTION ON THE STATUTORY PRESUMPTIONS OF IMPAIRMENT IN SECTION 316.1934(2) [FN1], FLORIDA STATUTES (2001), SUCH THAT IT IS ERROR TO GIVE THE STANDARD DUI JURY INSTRUCTION WHERE BLOOD ALCOHOL RESULTS WERE ADMITTED VIA THE TRADITIONAL PREDICATE?

FN1. Section 316.1934(2), Florida Statutes (2001), in pertinent part, provides:

At the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal faculties, the results of any test administered in accordance with s. 316.1932 or s. 316.1933 and this section are admissible into evidence when otherwise admissible, and the amount of alcohol in the person's blood or breath at the time alleged, as shown by chemical analysis of the person's blood, or by chemical or physical test of the person's breath, gives rise to the *following presumptions:*

(c) *If there was at that time a blood-alcohol level or breath-alcohol level of 0.08 or higher, that fact is prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired.* Moreover, such person who has a blood-alcohol level or breath-alcohol level of 0.08 or higher is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood-alcohol level or breath-alcohol level. (Emphasis supplied.)

We have accepted jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(4)(A) and 9.160(d). We answer the question in the negative. Since we have accepted jurisdiction over the certified question, we also have jurisdiction to address the county court's order on a motion to suppress, the merits of which are addressed, *infra. See*Fla. R.App. P. 9.160(f)(1); 9.140(c)(1)(B).

At approximately 4:00 a.m. on January 5, 2001, Davie Police Officer Lance Seltzer responded to a one-car accident. He observed a vehicle had crashed its front-end into a tree in the median. He then spoke with two eye-witnesses who informed him the vehicle had "just driven off the road" into the tree. Seltzer then made contact with Jennifer Schreiber, who was standing by the car, and was identified as its driver. According to Seltzer, he noticed a strong odor of alcohol emanating from her face. She told him she did not know what had happened and that both her ankles were in a lot of pain. She was given medical attention at the scene, and was transported to Broward County General Hospital where she was later treated for two fractured ankles. Schreiber was not placed under arrest at this time.

Seltzer went to the hospital and made contact with Schreiber. He claimed she ***346** still smelled of alcohol as they spoke. Seltzer asked her if he could take a sample of her blood; however, he did not read her her rights under the Implied Consent Law, §§ 316.1932, 316.1933, 316.1934, Fla. Stat. (2001). *See*§ 316.1932(1)(a)(2)(c), Fla. Stat. (2001)(one capable of responding may refuse to submit to blood test, provided his or her license will be suspended for a year for such refusal, and the refusal itself is admissible as evidence in any criminal proceeding). Schreiber consented to Seltzer's request and a nurse took two blood draws. These blood draws reflected a blood alcohol content ("BAC") of 0.15 and 0.14, respectively.

Thereafter Schreiber was charged with driving "while she was under the influence of an alcoholic beverage to the extent that her normal faculties were impaired and/or with a [BAC] of 0.08 or more," in contravention of Section 316.193, Fla. Stat. (2001). Schreiber moved to suppress the results of the January 5 blood tests that had been taken at Officer Seltzer's bequest, alleging her "consent" had not been knowing and voluntary, and Seltzer had lacked the authority to seize her blood. Schreiber also moved to strike that portion of the information which provided she had operated a motor vehicle "with a[BAC] of 0.08 or more," relying on this court's original opinion in *Dodge v. State,* 26 Fla. L. Weekly D1550 (Fla. 4th DCA June 20, 2001), which had held since the Implied Consent Law was "insufficient," a jury could not be instructed on the *presumption* of impairment. *See Miles v. State [Miles II],* 775 So.2d 950 (Fla.2000)(holding FDLE procedures for handling blood samples, as delegated in the Implied Consent Law, are inadequate, and therefore the State is not entitled to the presumptions of impairment associated with the Implied Consent statutory scheme). Meanwhile, the State had filed a motion for approval of a subpoena duces tecum for Schreiber's medical records from Broward General, which was granted. Schreiber moved to suppress these medical records as well.

All pending motions came before the county court on July 17, 2001. Testimony was received from both Officer Seltzer and Schreiber regarding the circumstances surrounding the January 5 blood draws. Expressly relying on this court's June 20, 2001 opinion in *Dodge,* on which rehearing was pending, the county court granted Schreiber's motion to strike that portion of the information which provided she had driven "with a[BAC] of 0.08 or more." The court continued to rule on the two suppression motions, granting Schreiber's motion to suppress the results of the January 5 blood draws, but denying her motion to suppress the subpoenaed medical records. Subsequent to the county court's orders entered below, this court withdrew its original opinion in *Dodge,* substituting a new opinion on rehearing. *Dodge v. State,* 805 So.2d 990 (Fla. 4th DCA 2001). Given our opinion on rehearing in *Dodge,* we answer the certified question in the negative. Florida law authorizes two alternative theories for the crime of driving under the influence: driving while one's normal faculties are "impaired" ["impairment theory"], or driving with a blood alcohol level of 0.08 or higher ["unlawful blood alcohol theory-DUBAL"]. § 316.193(1)(a),(b), Fla. Stat. (2001). As our Supreme Court noted in *Robertson v. State,* 604 So.2d 783 (Fla.1992), the second theory, DUBAL, is a strict-liability theory of DUI, since the fact of operating a motor vehicle with a BAC of [0.08] or higher constitutes the offense of DUI *even if impairment cannot be proven. Id.* at 792 n. 14 (emphasis supplied). The court further noted there is some redundancy in the statutory DUI scheme, since *impairment* is *presumed* if ***347** the defendant's BAC is [0.08] or higher. *See*§ 316.1934(2), Fla. Stat. However, the presumption of impairment created by s. 316.1934(2) is a moot concern if the State proves beyond a reasonable doubt that the defendant operated a motor vehicle with an unlawful BAC, *i.e.,* 0.08 or higher. *Id.* Adding further confusion to this redundancy issue, in *Miles II,* our Supreme Court held the statutory presumption provided for in s. 316.1934(2) was invalid, *i.e.,* the State is not legally entitled to the presumptions of impairment associated with the Implied Consent Law. *Miles II,* 775 So.2d at 953-56. Yet, the court reaffirmed the admissibility of blood results introduced through the three-prong predicate discussed in *Robertson,* and not introduced pursuant to the Implied Consent Law. *Id.* at 955-57 (but noting blood results introduced through the *Robertson* predicate are not entitled to the Implied Consent presumptions, which are specially contingent upon compliance with the Implied Consent Law); *see Robertson,* 604 So.2d at 789 (the party seeking to introduce test results must establish: (1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment, and (3) expert testimony must be presented concerning the meaning of the test).

On rehearing in *Dodge,* we adopted the Second District's analysis in *Tyner v. State,* 805 So.2d 862 (Fla. 2d DCA 2001), holding where BAC results have been properly admitted under the *Robertson* predicate, and not vis-a-vis the Implied Consent Law, the court may instruct the jury that if it finds the defendant did in fact drive with an unlawful BAC, the defendant is guilty of the crime of DUI. *Dodge,* 805 So.2d at 994-95. As such, the standard jury instruction, which includes the alternative theories of DUI (impairment and DUBAL), does not improperly instruct the jury on the Implied Consent *presumption of impairment,* since the jury can be instructed on DUBAL (provided blood results have been introduced via the *Robertson* predicate) absent proof of any impairment. The certified question is thus answered in the negative. Consequently, that portion of the lower court's order striking that portion of the information which provides Schreiber had driven "with a BAC of 0.08 or more" is reversed as well, where the introduction of blood test results via the *Robertson* predicate has not been foreclosed.[FN2]

FN2. We note Schreiber has not challenged the lower court's denial of her motion to suppress the subpoenaed medical records, which contain blood test results, in this appeal. *See Robertson,* 604 So.2d at 789-91 (test results of blood drawn for exclusively medical purposes are outside the scope of the Implied Consent Law, and may be seized and used as evidence in DUI prosecutions). If admitted at trial, this evidence would provide alternative evidentiary support for the giving of a jury instruction encompassing the DUBAL theory of DUI. *See Baber v. State,* 775 So.2d 258, 263 (Fla.2000)(hospital records of a blood test made for medical purposes may be admitted in criminal cases pursuant to the business record exception to the hearsay rule; however, defendants must be given a full and fair opportunity to contest the trustworthiness of such records before they are submitted into evidence).

[2] [3] The lower court's order granting Schreiber's motion to suppress the January 5, 2001 test results is affirmed. We find no error in the lower court's findings Schreiber's consent was not knowing and voluntary under the totality of the circumstances. *See* *State v. Jerome*, 541 So.2d 756, 757 (Fla. 4th DCA 1989). Furthermore, we hold Officer Seltzer lacked authority to compel Schreiber's blood pursuant to section 316.1933(1), where the only injury resulting from the accident was Schreiber's two fractured ankles, from which she fully recovered; Seltzer had no ***348** probable cause that her operation of the motor vehicle had resulted in the "death or serious bodily injury of a human being."§ 316.1933(1), Fla. Stat. (2001); *see* *Galgano v. Buchanan*, 783 So.2d 302 (Fla. 4th DCA 2001)(broken leg resulting in 5% permanent impairment did not constitute "serious bodily injury" under section 316.1933(1)); *cf.* *Gerlitz v. State*, 725 So.2d 393 (Fla. 4th DCA 1998)(compelled blood provisions of section 316.1933(1) applicable where victim of car accident suffered a broken back). Where Officer Seltzer lacked authority to compel Schreiber's blood, and Schreiber's consent to the blood draws conducted pursuant to his request was ineffectual, the lower court acted correctly in suppressing the results of those blood draws.

AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with the foregoing opinion.

GUNTHER and GROSS, JJ., concur.

Fla.App. 4 Dist.,2003.

State v. Schreiber

835 So.2d 344, 28 Fla. L. Weekly D278

Sample Sworn Motion to Reduce:

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 04-XXXX-CF-10A

THE STATE OF FLORIDA,

Plaintiff,

vs.

A.B.,

Defendant.

_____/

SWORN MOTION TO DISMISS/REDUCE RULE 3.190(c)(4)

COMES NOW the Defendant, A.B., by verified petition and by and through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), and moves this Honorable Court to dismiss/reduce the above referenced matter for the following reasons1:

> Note: We are not moving for complete dismissal of all charges. We are only moving for a reduction of the felony DUI charge to a misdemeanor level of DUI as we believe any injury the "victim" may have incurred in this case was legally not serious enough to be a felony "serious bodily injury." If this motion is granted, then this Honorable Court will no longer have jurisdiction over this matter and it must be transferred to County Court. We are also moving to dismiss two possession charges but, they are both misdemeanors.

1. The Defendant has been arrested and charged with crimes by police agents within the jurisdiction of the State of Florida.

1 We are **NOT** incorporating our general statement of facts into this motion.

2. The Defendant presently has charges pending before the above styled court as a result of said arrest.

3. In the instant matter, the Defendant is charged in one count with DUI Serious Bodily Injury, F.S. 316.193, a 3rd Degree Felony.

4. The facts of the case are as follows:

a. The State has charged the Defendant with being in an automobile accident in Plantation, Broward County, Florida on 7/12/03.

b. The Defendant was charged in the one felony count in the information with being under the influence of drugs and/or alcohol and or/chemical substances to the extent her normal faculties were impaired ***and*** having caused serious bodily injury to Plantation Police Officer Casey Mittauer.

c. Defense counsel moves to reduce this charge to DUI with either no injury or an injury less than a serious bodily injury as contemplated in F.S. 316. 1933.(1)(b).

d. Officer Mittauer had a small fracture to a neck bone. Thankfully, the injury was minor and has healed. He is now back to work, and allowed to perform normal police duties. He spent only 8 hours in the hospital after the accident. He also suffered a minor concussion and minor bruises from being involved in this accident.

The concussion and bruises all healed shortly after the accident.

e. Officer Mittauer filed a civil suit against the Defendant and it has been settled. The Defendant, in the civil suit, via her insurance attorney was allowed to have a medical doctor perform an independent medical examination (IME) by Dr. Richard E.Strain, a MD Orthopedic Surgeon. His report is attached.

That report shows that Officer Mittauer did not suffer an injury that meets the requirements of F.S. 316.1933(1)(b). That statue reads:

> (b) The term "serious bodily injury" means an injury to any person, including the driver, which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

The 4th DCA has said that... A police officer lacked authority to compel defendant's blood test under statute conferring such authority when there is probable cause to believe that a person driving under influence of alcohol (DUI) has caused serious bodily injury or death, where the only injury resulting from accident in which defendant's car struck tree on median was defendant's two fractured ankles, from which she fully recovered. *State v. Schreiber*, 835 So. 2d 344 (Fla. 4 DCA 2002).

Also, in another 4th DCA case the court said: There is no evidence that Galgano's traffic infraction fell within the ambit of section 318.19. Galgano's failure to yield the right-of-way did not result in death or cause "serious bodily injury" as defined in section 316.1933(1) [FN1]. **While Buchanan suffered a broken leg which resulted in a 5% permanent impairment, his injury did not amount to a "serious bodily injury" as defined in section 316.1933(1).**

Since the officer in the instant case had a bone fracture that completely healed and he is fully recovered, and the doctors give him a 1 or 2% impairment, his injuries are not serious enough to meet the standard found in the statute.

5. We hereby move to reduce this matter a misdemeanor as a result thereof.

6. We also move to dismiss the marijuana possession and paraphernalia possession charges as the police have sworn that they found those items and properly identified them as illegal *after* the Defendant was taken away in a fire rescue van. Also, the paraphernalia was found *outside* the Defendant's car. It is impossible to illegally possess something found on

the ground near a person's car. There is no evidence of the Defendant admitting that she had dominion or control over the marijuana they found or the paraphernalia.

6. Pursuant to Fla.R.Crim.P. 3.190(c)(4), there are no material disputed facts and the undisputed facts do not establish a *prima facia* case of guilt of a felony DUI or possession charges against the Defendant.

7. The Defendant hereby swears to the allegations made as contained in the Jurat found below.

8. This Honorable Court must now dismiss all felony charges and the two possession charges against the Defendant.

WHEREFORE, the Defendant moves this Honorable Court to grant the relief requested herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the Office of the State Attorney, XXXXX, Esq. ASA by US Mail this _____ day of _____, 200_.

Respectfully submitted,

MICHAEL A. CATALANO, P.A.
Attorney for Defendant
1531 N.W. 13 Court
Miami, Florida 33125
(305) 325-9818
Fla. Bar No.: 371221

BY:
Michael A. Catalano

JURAT

PERSONALLY APPEARED BEFORE ME, A.B., the Defendant herein, who after being duly sworn, deposes and states that the Affiant has read the statements and material facts contained herein and swears that same are true and correct.

Dated: _____ x_____
A.B./Defendant

Notary Public, State of
Florida

Identification produced: Florida DL copy in file

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 04-7494-CF-10A

THE STATE OF FLORIDA,

Plaintiff,

vs.

A.B.,

Defendant.

_____/

AMENDMENT TO
SWORN MOTION TO DISMISS/REDUCE RULE 3.190(c)(4)

COMES NOW the Defendant, A.B., by verified petition and by and through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), and moves this Honorable Court to dismiss/reduce the above referenced matter for the following reasons:

1. In addition to the already filed sworn motion to dismiss we are including the attached report of Dr. Jarolem. Since we have not heard from the State, and we supplied the report to them in the past, we not formally incorporate that report into our sworn motion to dismiss.

WHEREFORE, the Defendant moves this Honorable Court to grant the relief requested herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the Office of the State Attorney, XXXX, Esq. ASA by US Mail this _____ day of _____, 200.

Respectfully submitted,

MICHAEL A. CATALANO, P.A.
Attorney for Defendant
1531 N.W. 13 Court
Miami, Florida 33125
(305) 325-9818
Fla. Bar No.: 371221

BY:
Michael A. Catalano

JURAT

PERSONALLY APPEARED BEFORE ME, A.B., the Defendant herein, who after being duly sworn, deposes and states that the Affiant has read the statements and material facts contained herein and swears that same are true and correct.

Dated: _____ x_____
A.B.Defendant

Notary Public, State of Florida

Identification produced: Florida DL copy in file

Copy of Report of Dr. Jarolem is attached

TYPICAL TIME LINE:

State v. A.B.
04-XXXX-CF 10A

Time Line:

7/12/03:	3:46 am	Accident takes place
	4:50 am	Hospital Blood drawn: .77(Serum)
	5:34 am	Nurse Draws Forensic Blood Sample at Hospital .53 (Whole Blood)
	11:00 am	(approx) Officer Mittauer released from hospital
7/15/03	Defense counsel writes to City asking for Records	
8/12/03	Fax to Off. Vandenhouten asking to *again* not alter the police car	
8/19/03	ME Report: Alcohol .05 and antidepressants, no marijuana test	
8/21/03	Defense Counsel allowed to inspect police car. Risk manager promises to not have car "spoiled."	
9/27/03	Arrest report signed and notarized	
11/4/03	State asks police to obtain medical records of the Defendant from Broward General Hospital and Plantation Fire Rescue	
11/6/03	State prepares notice of intent to subpoena medical records	
	Defense Attorney Catalano speaks with Officer Campbell and tells him that the Defendant objected to subpoena of her medical records.	
	Defense counsel faxes objection to Officer Cambpell	
11/10/03	Defense hand delivers copy of objection to SAO	
12/19/03	Tickets Mailed to Defendant	
12/22/03	Tickets accepted by Defendant	
5/3/04	State Processes case for felony filing	

5/6/04	Information signed charging felony and is filed
5/27/04	Civil Complaint signed by Plaintiffs Attorney
5/27/04	Civil Suit Filed with Clerk of Circuit Court
6/3/04	Defendant taken into custody and bonds out
6/17/04	Counsel for Defendant files initial pleadings in Circuit Court
	Counsel for Defendant also files pleadings in County Court
6/25/04	Arraignment set in Circuit Court Set for trial 7/29/04
6/19/04	Service of Process on Civil Suit
6/29/04	Counsel (Catalano) files Notice of Appearance in Civil Court
7/29/04	First calendar call. Defense hands ASA letter with continuing objection to release of Defendant's medical records. Defense continuance.
	Court also issues an order mandating disclosure of where and when blood will be retested by the State.
8/10/04	National Medical Services receives forensic blood for marijuana test
8/13/04	*Hunter* hearing. No testimony. Court grants State's request and court signs order to release records to judge for in camera inspection only.
8/16/04	National Medical reports forensic blood positive for marijuana
8/23/04	State discloses blood test results from Penna.
9/7/04	State writes to judge and admits mistake in opening envelope
9/16/04	Again State writes to judge about second mistake
11/19/04	Clerk ordered to seal Defendant's medical records
1/14/05	Defense retains Dr. Goldberger to test blood at UF and asks Michael Wagner to send all existing forensic blood to UF lab
2/05	Civil Case Settled
2/10/05	Defense asks UF to test for alcohol and report

3/1/05	Dr. Goldberger (UF) reports blood .027
3/21/05	Defense asks UF to test for antidepressants as marijuana test is impossible due to small amount of blood left
4/22/04	Motions and Trial set in Criminal Matter

MOTION TO SUPPRESS STATEMENTS:

IN THE COUNTY COURT OF THE
11th JUDICIAL CIRCUIT IN AND
FOR MIAMI DADE COUNTY, FLORIDA

TRAFFIC DIVISION

CASE NO:

THE STATE OF FLORIDA,

Plaintiff,

v.

MR. CLIENT,

Defendant.
_____/

MOTION TO SUPPRESS CONFESSIONS, STATEMENTS AND ADMISSIONS

COMES NOW the Defendant, MR. CLIENT, by and through undersigned counsel and pursuant Fla. R.Crim.P. 3.190 (i), moves this Court to suppress as evidence at the time of trial in the above-styled cause all written and oral statements made by the accused to the police or other state agents. We also move to suppress all statements made by the accused to any person whatsoever. We move to suppress the statements made by the Defendant about drinking, taking medicine, driving, and all other statements made by the Defendant. As grounds therefore, it is alleged that:

1. The written and oral statements were obtained from the accused in violation of the Defendant's right to counsel and the Defendant's privilege against

self incrimination guaranteed by the Fifth, Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *Miranda v. Arizona,* 86 S. Ct. 1602 (1966), as well as guaranteed by F.R. Cr. P. 3.111 and Article I, Sections 9 and 16 of the Florida Constitution (1968).

2. The written and oral statements were obtained from the accused in violation of the Defendant's right to be free of unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution and by Article I, Section 12 of the Florida Constitution (1968). *Brewer v. Williams,* 97 S.Ct.1232 (1977); *Wong Sun v. United States,* 83 S. Ct. 407 (1963); *State v. Dixon,* 348 So.2d 333 (2nd DCA 1977); *Jones v. State,* 346 So.2d 639 (2nd DCA 1977); *Singleton v. State,* 224 So. 2d 378 (3rd DCA 1969); *French v. State,* 198 So. 2d 668 (3rd DCA Fla. 1967).

3. The written and oral statements obtained from the accused were not freely and voluntarily given, in violation of the Defendant's rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution (1968). The police used improper coercion to obtain statements and a breath test. The legal advice given by the police was improper.

4. The written and oral statements were obtained from the accused in violation of the Defendant's rights secured by 3.130 F.R.Cr.P.

5. The written and oral statements obtained from the defendant are not supported by an independent *prima facie* proof of the *corpus delicti* of the crime for which the defendant is charged.

6. All statements are also privileged and inadmissible under the Florida Accident Report Privilege Statute, F.S. 316.066. See also, *State v. Marshall*, 695 So. 2d 686 (Fla. 1997), and *Nelson v. DHSMV*, 757 So. 2d 1264 (Fla. 3rd DCA 2000).

WHEREFORE, the Defendant moves this Honorable Court to grant this Motion and suppress evidence as stated herein.

Certificate of Service removed to save space.

TYPICAL BAD STOP/BAD ARREST MOTION:

IN THE COUNTY COURT OF THE
11th JUDICIAL CIRCUIT IN AND
FOR MIAMI DADE COUNTY, FLORIDA

CASE NO.:

THE STATE OF FLORIDA,

Plaintiff,

vs.

MR. CLIENT,

Defendant.
_____/

TRAFFIC DIVISION

MOTION TO SUPPRESS PHYSICAL EVIDENCE - BAD STOP AND NO GROUNDS TO REQUEST TESTS AND NO GROUNDS TO MAKE AN ARREST

COMES NOW the Defendant, MR. CLIENT, by and through the undersigned attorney and files this, the Motion to Suppress Physical Evidence pursuant to Rule 3.190 (h) of the Florida Rules of Criminal Procedure and moves this Honorable Court to suppress as evidence all indicia of the alleged driver's driving under the influence of alcohol. We seek to suppress evidence because there was no legal reason to make a stop, no grounds in this case to request any DUI type tests, and later no grounds to make any arrest for any criminal law violation.

As grounds for this motion, the Defendant would show that the evidence mentioned above was obtained by law enforcement officers as a result of an unreasonable search and seizure in violation of the Defendant's rights guaranteed

by the Fourth and Fourteenth Amendments to the United States Constitution and Articles I, Section 1, of the Florida Constitution, in that:

1. The evidence was illegally seized without a search warrant because:

(a) The search was beyond the scope of that permitted by incident to lawful arrest. *Chimel v. California*, 395 U.S. 752 1969.

(b) There was no probable cause for the issuance of a search warrant for said search, if any warrant was issued.

(c) There was no probable cause or reasonable grounds to justify the search.

(d) There was sufficient opportunity to obtain a search warrant for said search if one was not obtained.

(e) The Defendant did not consent to any search or seizure.

(f) Said search/seizure was not incident to a lawful arrest and the evidence seized thereby represents the "fruit of the poisonous tree," *Wong Sun v. United States*, 371 U.S. 407,487 (1963).

(g) The connection between the illegal search and the discovery of evidence sought herein to be suppressed has not become sufficiently attenuated as to dissipate the taint of the original lawless conduct of the police. *Nardone v. United States*, 308 U.S. 338, 341 (1939) and *Wong Sun v. United States*, 371 U.S. 407, 487 (1963).

(h) The evidence sought herein to be suppressed was obtained as a result of an illegal detainment because the police authorities did not observe sufficient circumstances to formulate a reasonable belief that a crime had been committed by the Defendant. See Florida Statute 901.151, *State v. Gustafson*, 258 So. 2d 1 (Fla. 1972) and *Bailey v. State*, 1319 So. 2d 2 (Fla. 1975) and *Brendlin v. California*, 127 S. Ct. 2400 (2007).

(i) The evidence sought herein to be suppressed was not obtained pursuant to a legal "pat down" for weapons. *Sibron v. New York*, 392 U.S. 40 (1968).

(j) The stop was a mere pretext for a warrantless search. *State v. Kehoe*, 521 So. 2d 1094 (Fla. 1988), and *State v. Clark*, 511 So. 2d 726 (Fla. 1st DCA 1987). Under *Whren v. United States*, 116 S. Ct. 1769 (1996), *Holland v. State*, 696 So. 2d 757 (Fla. 1997) and *Payne v. State*, 654 So. 2d 1252 (Fla. 2d DCA 1995), the State must prove that a person violated a specific traffic or other law before having authority to make a stop and subsequent arrest. See *Crooks v. State*, 710 So. 2d 1041(Fla. 2nd DCA 1998), and *State v. Riley*, 638 So. 2d 507 (Fla. 1994), *Frierson v. State*, 28 F.L. W. D1329 (Fla. 4th DCA June 4, 2003) also cited at 28 Fla. L. W. D1828 (Fla. 4th DCA Aug. 6, 2003)(reh. den.) and *State v. Williams*, 10 Fla. L. W. Supp. 595 (Fla. 17th Cir. May 23, 2003, Weinstein, J).

(k) The officer had no legal grounds detain the Defendant. The officer did not see any law violation that would have given the officer legal

authority to stop and detain the Defendant. The Defendant violated no law.

(l) The detaining officer had no legal authority to stop and detain the Defendant. The stopping officer did not see any infraction or accident. Under Florida Law, the officer had no legal right to stop the defendant. Any evidence derived after the stop, must be suppressed. Even when an accident is involved, the police can not use the Defendant's statements to formulate grounds to make an arrest until after *Miranda* has been given and waived, otherwise, the Florida Accident Report Privilege statute will be violated. See F.S. 316. 066, 316.062 and *State v. Marshall*, 695 So. 2d 686 (Fla. 1997) and *Nelson v. DHSMV*, 757 So. 2d 1264 (Fla. 3d DCA 2000). This also applies to statements made by people other than the Defendant.

2. There were no grounds for the officer to detain the Defendant and ask for any DUI type test and furthermore no grounds to make an arrest. See *State v. Toepfer*, 14 Fla. L. W. Supp. 297 (Fla. Broward County Court, Nov. 15, 2006, Pollack, Judge). Even if there was grounds to stop the car, the officer(s) should not have detained the Defendant any longer than was needed to write a ticket and send the Defendant on his/her way. See. *Nulph v. State*, 838 So. 2d 1244 (Fla. 2nd DCA 2003) and *Napoleon v. State*, 33 Fla. L. W. D1678 (Fla. 1st DCA June 30, 2008).

3. As further grounds for this motion, the Defendant would show the following reasons for suppression together with a general statement of facts upon which this motion is based as required by *State v. Butterfield*, 285 So. 2d 626 (Fla.

4th DCA 1973):

(a) That on July 29, 2009 the arresting officer allegedly observed the Defendant driving a car on a certain road but, not violating any laws. The officer observed no illegal activity. Thereupon the officer affected an arrest for an alleged violation of a Florida Statute.

(b) Other facts to be shown at the hearing on this motion.

4. Since the officer had no legal grounds for detaining the Defendant, all evidence from the time when the officer detained the Defendant must be suppressed or excluded.

5. Additionally, the Defendant was not under the influence of alcohol or drugs of any kind to any extent. Therefore, there was no probable or reasonable ground to cause to ask for tests or make a DUI arrest. There are no facts that would justify a police officer in asking anyone to do any DUI type tests. The Police did not have legal grounds to ask for tests so, the test results must be suppressed and without them, the State does not have any evidence of legal grounds to have arrested the Defendant for DUI. The arrest is therefore illegal. *State v. Kilphouse*, 771 So. 2d 16 (Fla. 4th DCA 2000).

6. The police had no legal good faith reason(s) for stopping, detaining, seeking any tests, asking any questions or doing anything with the Defendant. The Stop and subsequent requests/tests must all be suppressed. Thereafter, the charges should be dismissed.

7. If the State is not ready with live witnesses to disprove the allegations in this motion, then we ask that it be granted, absent very good cause. See *State v. Fortesa-Ruiz*, 559 So. 2d 1180 (Fla. 3rd DCA 1990).

8. Other grounds to be argued *ore tenus*.

WHEREFORE, the Defendant respectfully requests this Honorable Court to grant this Motion to Suppress and suppress and/or exclude evidence from the trial of this matter as discussed herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished Via Hand Delivery to the Office of the State Attorney, on this _____ day of September, 2009.

Respectfully submitted:

MICHAEL A. CATALANO, P.A.
Attorney for the Defendant
1531 N.W. 13th Court
Miami, FL 33125
(305) 325-9818
Fla. Bar No: 371221
Miami-Dade Traffic Clerk Code # 2280
mclawyer@bellsouth.net

By: _____
Michael A. Catalano, Esq.

CLARK/TRAUTH MOTION ABOUT BAD IMPLIED CONSENT FORM:

IN THE COUNTY COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

TRAFFIC DIVISION

CASE NO.:

THE STATE OF FLORIDA,

Plaintiff,

vs.

MR. CLIENT,
Defendant.
_____/

MOTION TO SUPPRESS BREATH "READING" EVIDENCE

COMES NOW the Defendant, MR. CLIENT, by and through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.190, and moves this Honorable Court to exclude and/or suppress evidence of the breath, urine or blood test reading or results and all information pertaining thereto for the following reasons:

1. The Defendant has been arrested and charged with a crime by police agents within the jurisdiction of the State of Florida.

2. The Defendant presently has charges pending before the above styled court as a result of said arrest.

3. In the instant matter, the Defendant is charged with DUI, F.S. 316.193, a misdemeanor of the second degree.

4. The facts of the case are as follows:

a. On June 21, 2009, at approximately 4:48 a.m., a police officer of the Florida Highway Patrol stopped the Defendant. The police officer used his/her police powers to get the Defendant to perform physical exercises and to seek a breath/urine/blood sample. The police read an implied consent form to the Defendant to attempt to coerce the Defendant into submitting to a breath or urine or blood test. The Defendant was improperly coerced and was given material misinformation. As a result thereof, the Defendant submitted to a breath test and the results were .136/ .128.

b. The police had no reason to even suggest a "blood" test. They were using a form that was a "jack of all trades" form that really was a "master of none."

c. The police requested a breath, ***blood*** and urine test of the Defendant and the Defendant submitted after being told that the defendant's license would suspended for a minimum of 12 months if the Defendant didn't submit. (See attached implied consent forms). There was no legal reason to

demand, seek or even mention a blood test. The word "blood" should not have been mentioned at all. This was not an accident case with serious injuries or any injury to the Defendant and the Defendant had no injury that would have made a breath test impossible. The Defendant was improperly coerced into giving a breath, blood or urine sample. The police used improper promises and threats to obtain a breath, blood or urine sample from the Defendant. The police also materially misrepresented Florida Law.

Pursuant to *Trauth and Llamas v. DHSMV*, 14 Fla. L. W. Supp. 10A (Fla. 11th Cir. Oct. 17. 2006), *DHSMV v. Clark*, 32 Fla. L. W D2155 (Fla. 4th DCA Sept. 12, 2007)2, *Clark v. DHSMV*, 14 Fla. L. W Supp. 429a(Fla. 17 Cir. Ct. Dec 18, 2006), *Martin v. DHSMV*, (unpublished and attached) and *Whitehead v. DHSMV*, (also unpublished and attached)this Honorable Court must now exclude any reference to the request for breath, urine and/or blood tests and the submission and results of any such test(s). Both Mr. Trauth and Mr. Llamas were acquitted in criminal court but, had their refusal suspensions sustained at a DHSMV formal review hearing held pursuant to F.S. 322.2625. Both were consolidated on appeal and the result was the above referenced opinion that is binding on all county court judges in Miami-Dade County. At DHSMV hearings, the State's burden is a

2 This matter is now final. All motions for rehearing were denied and the matter was not appealed to the Florida Supreme Court.

simple preponderance burden. F.S. 322.2615(7). Now that the appellate court has ruled that they can not meet that burden, then, they certainly can not meet any required burden to allow the evidence to be admissible in criminal court. See also; *Burnett v. State*, 536 So. 2d 375 (Fla. 2d DCA 1988), *Chu v. State,* 521 So. 2d 330 (Fla. 4th DCA 1988), *State v. Perez,* 531 So. 2d 961 (Fla. 1988), *State v. Prues*, 478 So. 2d 1196 (Fla. 4th DCA 1985), *Slaney v. State,* 653 So. 2d 422 (Fla. 3d DCA 1995), *State v. Eve,* 4 Fla. L. W. Supp. 115 (Fla. Hillsborough County Court, Judge William Fuente, May 13, 1996) and, *State v. Waligroski,* 3 Fla. L. W. Supp. 454 (Fla. Hillsborough County Court, Judge Fuente Sept. 5, 1995). Since Slaney was handed down in 1995, the law was well settled that test evidence is not admissible if it was illegally obtained in DUI cases. See also, *State v. VcAvoy*, 13 Fla. L. W. Supp. 332 (Fla. 17the Cir. Broward County, Fla. Nov. 30, 2005)(Court correctly suppressed blood test evidence when accused was not properly informed that implied consent law only required submission to a breath and urine test).

The police then suspended the Defendant's license for many months pursuant to F.S. 322.2615. See *Wattron v. DHSMV,* 11 Fla. L. W. Supp. 1039 (Fla. 4th Cir. Sept. 9, 2004) and *Patrick v. DHSMV,* 11 Fla. L. W. Supp. 1039 (Fla. 7th Cir. July 27, 2004). Since the request was illegal, the police improperly coerced the Defendant and the breath test results and/or refusal evidence must now be suppressed or excluded.

Just as a citizen has a right to resist (without violence) and unlawful arrest, the Defendant had a right to refuse an unlawful request for a "blood" test. There were no legal grounds to seek a breath test. F.S. 316.1932, 316.1933 and 316.1934. The State can not argue that the form may list breath, urine and/or blood but, the police officer was actually only going to seek a breath sample as they made that same argument in the Trauth and Llamas matters and it was flatly rejected by the court. The court was so outraged by the position taken by the State via DHSMV that they also awarded attorneys fees to the petitioners.

5. Pursuant to Fla.R.Crim.P. 3.190, the breath test evidence must be suppressed and excluded from evidence in this matter.

6. The police agency should have used a standard form used by most police departments that never mentions a blood test. Attached are many samples of forms from many police departments in Miami-Dade County, Broward County and Monroe County. In 2002, The Florida Legislature amended F.S. 943.05 mandating that all Florida law enforcement agencies use standard forms for arrests and standard alcohol influence reports and that the forms be adopted by July 1, 2004. The police in Florida have not met that deadline.

7. Additionally, this Honorable Court must now dismiss all charges against the Defendant. If all charges are not dismissed then, the breath, urine and/or blood test evidence must be suppressed as it was obtained by illegal means

and illegal threats of a license suspension that could not be sustained. Illegal coercion should not be condoned by the courts.

WHEREFORE, the Defendant moves this Honorable Court to grant the relief requested herein.

CERTIFICATE OF SERVICE LEFT OUT TO SAVE SPACE.

REFUSAL MATERIALS:

13 Fla. L. Weekly Supp. 322a

Licensing -- Driver's license -- Suspension -- Refusal to submit to breath, blood or urine test -- Implied consent warning -- Where evidence included two affidavits containing general and specific language indicating implied consent warning was given for urine test and one affidavit with general language indicating implied consent warning was given for blood test, evidence is sufficient to support hearing officer's conclusion that implied consent warnings were given to licensee prior to each test -- Where refusal affidavit indicates urine test was refused, but probable cause affidavit states that licensee could not provide urine sample because she did not understand, there is no competent substantial evidence upon which hearing officer could have based finding that licensee refused urine test -- Where arresting officer's statements in probable cause affidavit were contradictory regarding refusal of blood test, stating blood was given by consent and that consent was withdrawn, and licensee was charged based on alleged urine test refusal rather than blood test refusal, there is lack of evidence to support conclusion that licensee refused blood test -- Where licensee did provide breath sample, hearing officer should have given motion to invalidate suspension on basis that breath test was not refused the merit it deserved -- License reinstated

CHERYL H. STACK, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 05-012 AP. January 10, 2006. On certiorari appeal from final determination of driver's license suspension for refusal to submit to urine testing pursuant to Florida Statute sections 316.193, 316.1932 (2005). Counsel: Rhonda F. Goodman, Rhonda F. Goodman, P.A., Miami, for Petitioner. Carlos J. Raurell, for Respondent.

(Before KORVICK, BAGLEY, and SCHUMACHER, JJ.)

(KORVICK, J.) The Petitioner, Cheryl Stack (Stack), petitions for certiorari review and relief from the Respondent's, State of Florida, Department of Highway Safety and Motor Vehicles (Department), suspension of her driver's license for one year from December 7, 2004 through October 17, 2005. We find that the hearing officer failed to follow the essential requirements of the law, and that her findings were not based upon competent and substantial evidence. Therefore, we grant the writ of certiorari and quash the hearing officer's order, reinstating Stack's driver's license.

FACTS

On October 18, 2004, at approximately 1:26 a.m. Stack was in her vehicle stopped in the middle of the roadway in Broward County, causing other vehicles to swerve to avoid a collision. Officer Keegan arrived on the scene and made contact with the Petitioner and observed that she was exhibiting signs of impairment. Officer Mason arrived on the scene shortly thereafter and noticed the Petitioner had red, watery and bloodshot eyes and had a strong odor of alcohol coming from

her breath as she spoke. Officer Mason conducted field sobriety exercises which Stack failed, and placed her under arrest.

According to the "Implied Consent Warning" form, Officer Mason requested that Stack submit to a breath test, since that test was circled on the form. Petitioner submitted to the breath test and the results were .000 and .000 g/210L, as shown in the "Breath Test Result Affidavit."

Subsequently, urine and blood tests were attempted. The circumstances are unclear regarding the provision of the implied consent warning for either of these tests. There are no "Implied Consent Warning" forms for either the urine or blood tests in the record. Any basis for forming the conclusion that consent warnings were read for the urine and blood tests must come from the "Probable Cause Affidavit" and "Refusal to Submit to Breath, Urine, or Blood Test" affidavit.

For the blood test, the "Probable Cause Affidavit" says, "Implied consent read. . . . Blood was taken by consent. . . . As rescue started blood draw, she withdrew consent." However, the "Refusal to Submit to Breath, Urine, or Blood Test" affidavit only indicates that a urine test was refused, since urine is circled on the form. There is no "Refusal to Submit to Breath, Urine, or Blood Test" affidavit for blood in the record.

For the urine test, the "Probable Cause Affidavit" generally mentions "Implied consent read." The Affidavit additionally reads "Unable to provide urine sample, she could not understand." There is, however, a "Refusal to Submit to Breath, Urine, or Blood Test" affidavit, wherein urine is circled, supporting the conclusion that Stack refused to provide a urine sample. Thus, the evidence regarding urine test refusal conflicts.

Stack challenged the suspension of her driver's license pursuant to section 322.2615 of the Florida Statutes. The hearing officer issued a final order of license suspension, making certain findings of fact. The findings of fact iterate that the hearing officer believed that the officers had probable cause to believe the petitioner was driving under the influence of alcohol and that she was lawfully arrested. However, regarding the implied consent warnings and any refusals, the findings of fact only address breath and blood tests. Regarding the blood test refusal, the hearing officer recited the events as described in the "Probable Cause Affidavit." There is no specific mention of urine testing, rather, just the general reference to refusals of "breath, blood or urine test[s][.]" The hearing officer also denied Stack's motion to invalidate suspension on the basis that a breath test was not refused.

The period for suspension of the driving privileges expired on October 17, 2005. Therefore, this appeal appears to be moot. However, this opinion is being provided since this case poses a question of law that has, and is likely to again, repeat itself.

STANDARD OF REVIEW

On certiorari review, the reviewing court is charged with determining whether the lower court or administrative agency (1) afforded procedural due process (2) observed the essential requirements of the law and (3) based its findings on competent, substantial, evidence. *Dusseau*

v. Metro. Dade County Bd. of County Com'r, 794 So.2d 1270, 1275 (Fla. 2001); *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000). Where "substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [the appellate court] should not overturn the agency's determination. *Cohen*, 450 So. 2d at 1241. Here, this Panel must determine whether the hearing officer's ultimate conclusion that Stack "refused to submit to a breath, blood, or urine test" followed the essential requirements of the law and was based on competent and substantial evidence.

At a DHSMV hearing, the hearing officer must determine the following:

If the license was suspended for refusal to submit to a breath, blood, or urine test:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.

2. Whether the person was placed under lawful arrest for a violation of s. 316.193.

3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.

4. Whether the person was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(b), Fla. Stat. (2005) (emphasis added). Here, the hearing officer was provided with the affidavits from the arresting officers, and heard Stack's objections to the conclusion that she refused urine and blood tests. This court must review the following: (A) whether implied consent warnings were provided prior to each test; (B) whether Stack refused to submit to urine testing; (C) whether Stack refused to submit to blood testing; and (D) whether to award attorney's fees in this case.

IMPLIED CONSENT WARNINGS WERE
PROVIDED FOR EACH TEST

In *Winthrop*, the petitioner sought review of the suspension of his driver's license for a DUI violation. 11 Fla. L. Weekly Supp. 535c. The court found that because "the arrest affidavit [did] not refer to implied consent warnings generally or specifically," suspension of the license was unfounded. The court compared its ruling with *Perry*, and determined that the facts were different, because in *Perry*, the affidavit submitted generally mentioned providing consent warnings. *See Winthrop, supra.* In making this determination the court noted that its ruling was based on the fact that implied consent warnings were not properly administered, noting: "[i]n accordance with *Perry*, and section 322.2615, Fla. Stat. [sic] (2003), *the officer was required to administer the implied consent warnings again*[.]" *Winthrop*, 11 Fla. L. Weekly Supp. 535c

(emphasis added). Likewise, in *Perry*, the court analyzed the law and found that implied consent warnings were required prior to the administration of any blood alcohol level test. 751 So. 2d at 1279.

Failure to provide the implied consent warnings would prevent suspension of a license because there would be no violation. § 322.2615, Fla. Stat. While the statute only provides that consent warnings be provided prior to a test, and does not specify when, the cases indicate that warnings must be given prior to each test. This is true at least where the tests are spread apart in time and place. Furthermore, the statute's requirement that affidavits be provided indicating those warnings that were given and refused support this conclusion.

Here, implied consent warnings should have been given prior to each test. What remains is whether the evidence provided in the record was competent and substantial evidence that those warnings were provided.

Florida Statute requires that the arresting officer must provide "the results of any breath or blood test or *an affidavit stating that a breath, blood or urine test was requested by a law enforcement officer or correctional officer and that the person arrested refused to submit*" to the test. § 322.2615(2), Fla. Stat. This affidavit can be satisfied by either text in the probable cause affidavit, or a specially-designated affidavit. *Perry,* 751 So. 2d at 1279.

In *Perry,* the court reviewed the circuit's reversal of a driver's license suspension based on lack of a refusal affidavit. *Id.* at 1278. The law enforcement department had "developed a refusal affidavit form for use by law enforcement to ensure compliance with the procedures of the implied consent statute." *Id.* at1279. The affidavit was not admitted because it was not signed. *Id.* The court noted that a "properly executed. . . affidavit is evidence that the implied consent warnings were given[.]" *Id.* However, the court found that it was unnecessary to have an affidavit that explicitly recited the actual language in the statute. *Id.* at 1280. The court found that "the statute . . . does not require that the affidavit recount the specific information set forth in the . . . form *or that the complete text of the implied consent warnings be quoted verbatim in the affidavit*." *Id*. Analogizing to *Miranda* warnings, the court concluded that "implied consent warnings are standard instructions which can be identified in an affidavit by simple reference." *Id.* Since the arrest affidavit contained general language stating that implied consent warnings were read, the "arrest affidavit filed was sufficient to meet the dual affidavit requirements of section 322.2615(2)." *Id.* Thus, there was competent evidence to support the driver's license suspension. *Id.* at 1279-80.

Here, there are similar facts as *Perry.* The "Probable Cause Affidavit" generally states "Implied consent read[,]" and goes on to describe the alleged refusal of both the urine and blood tests. Additionally, here, unlike *Perry,* there is actually a "Refusal" affidavit as required by section 322.2615(2). The difference here is that the affidavit is admitted because it is signed. Under *Perry,* combining the language of the "Probable Cause Affidavit" and the "Refusal" affidavit would amount to competent and substantial evidence that implied consent warnings were given.

This case is dissimilar from *Winthrop* in one defining respect: here, there are both general and specific language indicating that an implied consent warning was given for urine, and general language indicating that an implied consent warning was given for blood. In *Winthrop*, the court distinguished the case from *Perry* because "[t]he arrest affidavit [did] not refer to implied consent warnings generally or specifically . . . [t]he arrest affidavit merely states that [p]etitioner refused to provide a urine sample, with no mention whatsoever that the implied consent warnings were given." 11 Fla. L. Weekly Supp. 535c. Therefore, because there was no evidence to support a finding that implied consent warnings were read, the hearing officer failed follow the essential requirements of the law.

The essential requirement of the law is that there be an affidavit indicating a general reference to reading the implied consent warning. *See Perry,* and *Winthrop, supra.* The presence of such affidavit is competent and substantial evidence that implied consent warnings were given. Here, there are two affidavits for the urine test, and one general affidavit for the blood test. Such evidence is sufficient to support the hearing officer's conclusions.

STACK'S INABILITY TO URINATE IS NOT A REFUSAL

Stack was cited for refusal of urine testing. Although the hearing officer apparently based her decision on Stack's alleged refusal of breath and blood testing, the urine test is fully addressed below.

As stated above, there is a discrepancy in the record regarding Stack's refusal of the urine test. In the "Probable Cause Affidavit," the officer indicated that Stack could not provide a sample. This statement raises the inference that Stack did not *refuse* to take the urine test, but, rather, *could not* urinate on demand. Therefore, the "Refusal to Submit" Affidavit is contradictory.

In *Wolok v. Mellon,* 1 Fla. L. Weekly Supp. 204a (Fla. Cir. Ct. 1992), this circuit court reversed a driver's license suspension. The petitioner was unable to urinate on demand, and requested that the officer "turn on the water tap[,]" however, the officer refused to do so. *Id.* Because the petitioner had a "bashful kidney[,]" the circuit court determined that his *inability* to urinate was not a *refusal* to urinate.

The facts of this case are similar to *Wolok*, if the statement in the "Probable Cause Affidavit" is taken as fact, since it indicated that Stack could not provide a urine sample because she did not understand. Such inability is not necessarily a refusal.

In *Trimble,* the court determined that conflicting evidence in the record, when the sole basis relied upon for support, cannot be used as competent and substantial evidence. 821 So. 2d 1087. The circuit court reversed a license suspension because there were conflicting times in the record. *Id.* at 1086. The First District determined that the circuit's determination that such conflicting evidence could not be competent and substantial evidence was not an improper re-weighing of the hearing officer's findings of fact. *Id.* Rather, because "[t]he hearing officer's finding that [the petitioner] was given a consent warning before her refusal could have rested as

much on the flip of a coin as on the documentary evidence submitted[,]" the underlying evidence was deemed incompetent and unsubstantial. *Id.* at 1087.

Here, there is similar conflict regarding the urine test refusal. The "Refusal" affidavit indicates that urine was refused. However, the "Probable Cause Affidavit" indicates that Stack simply did not understand. Therefore, there apparently is no competent and substantial evidence upon which the hearing officer could have based finding that Stack refused a urine test. The record is so conflicting that a conclusion could not have been reached.

RECORD IS NOT COMPETENT AND SUBSTANTIAL
REGARDING STACK'S ALLEGED REFUSAL TO
SUBMIT TO BLOOD TESTING

The hearing officer's order mainly focuses on Stack's refusal of a blood test. The issue is whether the contradictory language in the affidavit amounts to "inconsistent inferences, . . . [that] can hardly be deemed so sufficiently reliable that a reasonable mind would accept it as adequate to support the conclusion reached." *Trimble,* 821 So. 2d at 1087. In *Trimble,* there were several timeline inconsistencies in the record. *Id.* at 1086. Lack of continuity prevents the record from being competent and substantial evidence that implied consent warnings were given. *Id.* at 1087.

The record evidence is not competent and substantial regarding Stack's refusal of a blood test. The arresting officer's statements in the "Probable Cause Affidavit" are contradictory. *See Trimble, supra.* Further, since Stack was charged based on the alleged urine test refusal, the hearing officer's determination is even less compelling. This case is one of lack of documentary evidence to support the conclusion reached.

INVALIDATION OF LICENSE
SUSPENSION WAS ERRONEOUS

It is obvious from the record that Stack did provide a breath sample and submit to a breath test. Therefore, the hearing officer should have given the motion the merit it deserved. However, since Stack refused the blood test, license suspension was still appropriate.

ATTORNEY'S FEES

Stack has requested an award of attorney's fees. There is no legal basis to award attorney's fees under these facts. Therefore, they are denied.

For these reasons, we grant Stack's petition for writ of certiorari, quash the decision of the Department's hearing officer and reinstate Stack's driver's license. Stack's request for attorney's fees is denied. (BAGLEY and SCHUMACHER, JJ., concur.)

* * *

Licensing -- Driver's license suspension -- Evidence insufficient to show that licensee who was issued a DUI citation willfully refused to take urine test to test his unlawful blood alcohol level

MICHAEL D. WOLOK, Petitioner, v. LEONARD MELLON, AS EXECUTIVE DIRECTOR OF THE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. 11th Judicial Circuit in and for Dade County, Florida, Appellate Division. Case No. 92-021-AP. A Petition for Writ of Certiorari from an Administrative Order from the Bureau of Driver Improvement, Department of Highway Safety and Motor Vehicles. Michael D. Wolok, pro se. Rafael E. Madrigal, Attorney for respondent.

(BEFORE ROBINSON, RAMIREZ, and B. SHAPIRO, JJ.)

(ROBINSON, J.) Petitioner, Michael D. Wolok filed a Petition for Writ of Certiorari against the State of Florida, Department of Highway Safety and Motor Vehicles. He challenges the Department's decision in a formal review hearing of his driver's license suspension, conducted pursuant to section 322.2615(6) and rule 15A-6.013, Florida Administrative Code.

We reverse on the simple point that the evidence against Mr. Wolok was insufficient to show that he willfully refused to take a urine test to test his unlawful blood alcohol level. Mr. Wolok testified that his failure to urinate was not willful but because of a physical inability to urinate on demand. He testified that he had a ``bashful" kidney, and he was inhibited by the officer who stared at his genitals. He also testified that he requested to turn on the water tap, but the officer denied his request claiming that running water would disturb others in the building. This evidence was not rebutted by any competent substantial evidence. The Department could have called the arresting officer and any other witness but chose not to do so. It instead relied on the arresting officer's affidavit which was on a full in the blank form and did not address the issue raised.

It is unnecessary to reach the constitutional issue raised in Judge Ramirez's special concurring opinion, and we choose not to do so. *See Singletary v. State*, 322 So.2d 551 (Fla. 1975).

We grant the Petition for Writ of Certiorari and order the Department of Motor Vehicles to set aside its suspension. (B. Shapiro, JJ. concurs.)

-- -- -- --

(RAMIREZ, J. Specially concurring) This case dramatizes the problems with §322.2615, F.S. (1989). The petitioner was properly arrested on August 29, 1991, and he submitted to a breath alcohol test. The results were .094 and .096 barely under the legal limit. The testing officer concluded that petitioner was impaired due to alcohol, but for some unexplained reason requested that ``DTR" respond for further testing. When the drug testing officer arrived, he attempted to administer a urine test, but the petitioner was unable to urinate on demand. The officer interpreted this as a refusal and filed an Affidavit of Refusal to Submit to Breath, Urine or Blood Test.

He was then issued a DUI citation which, pursuant to §322.2615(1)(a), F.S. (1989), served as a seven-day temporary permit and notice of suspension of his driving privileges.

The petitioner filed a timely request for a formal review of his license suspension, which was held on December 19, 1991. At the hearing before officer Warren Cantey of the Bureau of Driver Improvement, the only witness was the petitioner. The hearing officer thought the petitioner had refused a breath test since the Affidavit does not specify which test the petitioner refused. Only through the testimony of the petitioner was the hearing examiner made aware of the fact that the alleged refusal was for a urine test. The hearing resulted in the continued suspension of his license for a period of 12 months.

More than fourteen (14) months have elapsed since the petitioner's arrest. Obviously the relief granted under the statute was woefully inadequate. It provides as follows:

322.2615 Suspension of license; right to review.

(1)(a) A law enforcement officer or correctional officer shall, on behalf of the department, suspend the driving privilege of a person who has been arrested by a law enforcement officer for a violation of s. 316.193, relating to unlawful blood alcohol level, or of a person who has refused to submit to a breath, urine or blood test authorized by s. 316.1932. The officer shall take the person's driver's license and issue the person a 7-day temporary permit if the person is otherwise eligible for the driving privilege and shall issue the person a notice of suspension. If a blood test has been administered, the results of which are not available to the officer at the time of the arrest, the agency employing the officer shall transmit such results to the department within 5 days after receipt of the results. If the department then determines that the person was arrested for a violation of s. 316.193 and that the person had a blood alcohol level of 0.10 or higher, the department shall suspend the person's driver's license pursuant to subsection (3).

(b) The suspension under paragraph (a) shall be pursuant to, and the notice of suspension shall inform the driver of, the following:

1.a. The driver refused to submit to a lawful breath, blood, or urine test and his driving privilege is suspended for a period of 1 year for a first refusal or for a period of 18 months if his driving privilege has been previously suspended as a result of a refusal to submit to such a test; or

b. The driver violated s. 316.193 by driving with an unlawful blood alcohol level as provided in that section and his driving privilege is suspended for a period of 6 months for a first offense or for a period of 1 year if his driving privilege has been previously suspended for a violation of s. 316.193.

2. The suspension period shall commence on the date of arrest or issuance of the notice of suspension, whichever is later.

3. The driver may request a formal or informal review of the suspension by the department within 10 days after the date of arrest or issuance of the notice of suspension, whichever is later.

4. The temporary permit issued at the time of arrest will expire at midnight of the 7th day following the date of arrest or issuance of the notice of suspension, whichever is later.

5. The driver may submit to the department any materials relevant to the arrest.

(2) Except as provided in paragraph (1)(a), the law enforcement officer shall forward to the department, within 5 days after the date of the arrest, a copy of the notice of suspension, the driver's license of the person arrested, and a report of the arrest, including an affidavit stating the officer's grounds for belief that the person arrested was in violation of s. 316.193; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person arrested refused to submit; a copy of the citation issued to the person arrested; and the officer's description of the person's field sobriety test, if any. The failure of the officer to submit materials within the 5-day period specified in this subsection and in subsection (1) shall not affect the department's ability to consider any evidence submitted at or prior to the hearing. The officer may also submit a copy of a videotape of the field sobriety test or the attempt to administer such test.

(3) If the department determines that the license of the person arrested should be suspended pursuant to this section and if the notice of suspension has not already been served upon the person by a law enforcement officer or correctional officer as provided in subsection (1), the department shall issue a notice of suspension and, unless the notice is mailed pursuant to s. 322.251, a temporary permit which expires 7 days after the date of issuance if the driver is otherwise eligible.

(4) If the person arrested requests an informal review pursuant to subparagraph (1)(b)3., the department shall conduct the informal review by a hearing officer employed by the department. Such informal review hearing shall consist solely of an examination by the department of the materials submitted by a law enforcement officer or correctional officer and by the person arrested, and the presence of an officer or witness is not required.

(5) After completion of the informal review, notice of the department's decision sustaining, amending, or invalidating the suspension of the driver's license of the person arrested must be provided to such person. Such notice must be mailed to the person at the last known address shown on the department's records, or to the address provided in the law enforcement officer's report if such address differs from the address of record, within 21 days after the expiration of the temporary permit issued pursuant to subsection (1) or subsection (3).

(6)(a) If the person arrested requests a formal review, the department must schedule a hearing to be held within 30 days after such request is received by the department and must notify the person of the date, time, and place of the hearing.

(b) Such formal review hearing shall be held before a hearing officer employed by the department, and the hearing officer shall be authorized to administer oaths, examine witnesses and take testimony, receive relevant evidence, issue subpoenas, regulate the course and conduct of the hearing and make a ruling on the suspension. The department and the person arrested may

subpoena witnesses and the party requesting the presence of a witness shall be responsible for the payment of any witness fees and for notifying in writing the state attorney's office in the appropriate circuit of the issuance of the subpoena. If the person who requests a formal review hearing fails to appear and the hearing officer finds such failure to be without just cause, the right to a formal hearing is waived and the department shall conduct an informal review of the suspension under subsection (4).

(c) A party may seek enforcement of a subpoena under paragraph (b) by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, a person shall not be in contempt while a subpoena is being challenged.

(d) The department must, within 7 days after a formal review hearing, send notice to the person of the hearing officer's decision as to whether sufficient cause exists to sustain, amend, or invalidate the suspension.

(7) In a formal review hearing under subsection (6) or an informal review hearing under subsection (4), the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be limited to the following issues:

(a) If the license was suspended for driving with an unlawful blood alcohol level in violation of s. 316.193:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.

2. Whether the person was placed under lawful arrest for a violation of s. 316.193.

3. Whether the person had an unlawful blood alcohol level as provided in s. 316.193.

(b) If the license was suspended for refusal to submit to a breath, blood, or urine test:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.

2. Whether the person was placed under lawful arrest for a violation of s. 316.193.

3. Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.

4. Whether the person was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

(8) Based on the determination of the hearing officer pursuant to subsection (7) for both informal hearings under subsection (4) and formal hearings under subsection (6), the department shall:

(a) Sustain the suspension of the person's driving privilege for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such tests, if the arrested person refused to submit to a lawful breath, blood, or urine test. The suspension period commences on the date of the arrest or issuance of the notice of suspension, whichever is later.

(b) Sustain the suspension of the person's driving privilege for a period of 6 months for a violation of s. 316.193, or for a period of 1 year if the driving privilege of such person has been previously suspended as a result of a violation of s. 316.193. The suspension period commences on the date of the arrest or issuance of the notice of suspension, whichever is later.

(9) A request for a formal review hearing or an informal review hearing shall not stay the suspension of the person's driver's license. If the department fails to schedule the formal review hearing to be held within 30 days after receipt of the request therefor, the department shall invalidate the suspension. If the scheduled hearing is continued at the department's initiative, the department shall issue a temporary driving permit which shall be valid until the hearing is conducted if the person is otherwise eligible for the driving privilege. Such permit shall not be issued to a person who sought and obtained a continuance of the hearing. The permit issued under this subsection shall authorize driving for business or employment use only.

(10) A person whose driver's license is suspended under subsection (1) or subsection (3) may apply for issuance of a license for business or employment purposes only if the person is otherwise eligible for the driving privilege pursuant to s. 322.271.

(11) The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test or blood test or the refusal to take either test. However, as provided in subsection (6), the driver may subpoena the officer or any person who administered or analyzed a breath or blood test.

(12) The formal review hearing and the informal review hearing are exempt from the provisions of chapter 120. The department is authorized to adopt rules for the conduct of reviews under this section.

(13) A person may appeal any decision of the department sustaining a suspension of his driver's license by a petition for writ of certiorari to the circuit court in the county wherein such person resides or wherein a formal or informal review was conducted pursuant to s. 322.31. However,

an appeal shall not stay the suspension. This subsection shall not be construed to provide for a de novo appeal.

(14) The decision of the department under this section shall not be considered in any trial for a violation of s. 316.193, nor shall any written statement submitted by a person in his request for departmental review under this section be admissible into evidence against him in any such trial. The disposition of any related criminal proceedings shall not affect a suspension imposed pursuant to this section.

The statute describes two circumstances that allow a police officer to suspend someone's license: (1) if the officer has probable cause to believe a person is in violation of s. 316.193 by driving with an unlawful blood alcohol level or (2) if the person refuses to submit to the officer's request to take a breath, blood or urine test.

It should be initially noted that the statute does not require the arresting officer to administer any kind of test. The statute says simply that if the officer has probable cause to believe that the person is driving with an unlawful alcohol level, the officer shall take the person's license and issue a 7-day permit. While most officers may wait until after a test has been administered to see the results, the statute does not require it. In this particular case, with test results only .006% and .004% under the legal limit, the officer could have nevertheless felt he had probable cause to believe that at the time the defendant was driving, the results would have been .10%. In addition, if a defendant requests a urine or blood test, it does not have to be honored under this statute.

This is an important consideration because it differs from other jurisdictions with similar statutes. In Illinois, for example, a license can be suspended only after a driver ``submits to a chemical test which indicates an alcohol concentration of .10 or more in their blood, urine, or breath." *People v. Esposito*, 521 N.E. 2d 873, 876 (Ill. 1988). *See also*, *Henry v. Edmisten*, 340 S.E. 2d 720, 723 (N.C. 1986); *Heddan v. Dirkswager*, 336 N.W. 2d 54, 57 (Minn. 1983); *Gonzales v. Franklin County Municipal Court*, 595 F. Supp. 382, 385 (S.D. Ohio 1984).

Once the officer makes the determination to suspend the license and gives the driver a 7-day permit, the department does not have to give the driver an informal hearing until 21 days after the expiration of the temporary permit or 30 days after a request for a formal hearing. Thus, in every case the driver will be unable to drive for any reason for a certain period of time no matter how baseless the arrest or suspension. The statute specifically provides that the request for a hearing will not stay the suspension. In the event the department is unable to schedule a formal hearing within 30 days, it must issue a temporary permit. But this permit will authorize driving for business or employment use only.

Other states do not provide for such a lengthy delay between a license suspension and review. Indiana provides for judicial review prior to suspension *Ruge v. Kovach*, 467 N.E. 2d 673, 679 (Ind. 1984). In Ohio, the suspension can only take effect, except by court action, after the court makes certain prescribed findings at which the defendant can appear and be heard. *Gonzalez v. Franklin County Municipal Court*, 595 F. Supp. 382, 387 (S.D. Ohio 1984). In Illinois, a judicial hearing must be conducted within 30 days of its request but the suspension does not take effect

until 46 days after the driver is notified of the suspension. *People v. Esposito*, 521 N.E. 2d 873, 880 (Ill. 1988). In North Carolina, the revocation period begins at the time the revocation order is issued by a judicial officer and continues for 10 days. *Henry v. Edmisten*, 340 S.E. 2d 720, 723 (N.C. 1986). In California, the driver is given a 45-day temporary permit. *Claxton v. Zolin*, 8 Cal.App.4th 553, 10 Cal. Rptr. 2d 319 (Cal. App. 5 Distr., 1992). The administrative hearing must take place before the effective date of the suspension. *Robertson v. Dept. of Motor Vehicles*, 7 Cal. App. 4th 938, 9 Cal. Rptr. 2d 319, 321 (Cal. App. 1 Dist., 1992).

The hearings under the statute are conducted by employees of the Division of Drivers Licenses of the Department of Highway Safety and Motor Vehicles. These employees must decide by a preponderance of the evidence whether (1) the officer had probable cause to believe the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances (2) the person was placed under lawful arrest for a violation of s. 316.193 and (3) the person had an unlawful blood alcohol level or refused to submit to a breath, urine or blood test and (4) in a refusal, the person was told that a refusal would result in a suspension for one year or 18 months if previously suspended.

The statute specifically limits review to those issues. No discovery is permitted. The hearing is exempted from the Administrative Procedures Act. The arresting officer need not be present but may be subpoenaed by either party. The person who administered or analyzed the test is excused from being present but the unsworn results of the tests may be considered. The driver cannot challenge the accuracy of the test results or the qualifications of the test technician.

Other states have not limited the driver's rights in this way. In *People v. Orth*, 506 N.E. 2d 960 (Ill. 1987), the court held that once a breathalyzer test is utilized, the admissibility of the test depends on several factors. The State must demonstrate the accuracy of the breathalyzer and that its operator was qualified to perform the test.

Not only was there no competent and substantial evidence before the hearing officer to sustain the suspension, but the uncontroverted evidence was entirely to the contrary. The only evidence before the hearing officer was that the petitioner could not urinate on demand while the officer stared at the petitioner cup in hand with his pants down.

The statute violates petitioner's rights to due process. The fundamental requirement of due process is the opportunity to be heard ``at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Florida's statutory scheme fails to provide this opportunity.

In *Matthews v. Eldridge*, 424 U.S. 319 (1976), the U.S. Supreme Court outlined the three factors to be considered in a due process analysis: (1) the nature and weight of the private interest affected by the administrative action; (2) the likelihood of erroneous deprivation of the private interest involved; and (3) the state's interest in the summary suspension, including the administrative and fiscal burden that would result from alternative procedures. 424 U.S. 335.

The U.S. Supreme Court, in *Dixon v. Love*, 431 U.S. 105 (1977), examined Illinois' statutory scheme for summary suspension of drivers' licenses based on official records for multiple traffic offense convictions. The Court recognized that the due process clause applies to the deprivation of a driver's license by the State and that a licensee is not made entirely whole if the suspension or revocation is later vacated.

Under the Illinois point system, Love had the benefit of a full judicial hearing in connection with each of the traffic convictions on which his suspension was based. Under Florida's statutory scheme, Wolok's first contact with the judiciary is this appeal.

The suspension of Love's license was largely automatic. Although there was a possibility of clerical error, it was easy to spot and correct. A pre-suspension hearing would merely give the licensee an opportunity to ask for leniency. Here, the hearing officer must wrestle with issues such as probable cause and the legality of the arrest.

In *Mackey v. Montrym*, 443 U.S. 1 (1979), the Court upheld a Massachusetts statute that mandated suspension of a driver's license upon refusal to submit to a breath test. The Court recognized that a driver will not be made whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through postsuspension review procedures. The weight to be given to this private interest in a driver's license depends on three factors: (1) the duration of any potentially wrongful deprivation; (2) the availability of prompt post-revocation review; and (3) the availability of hardship relief. 443 U.S. 11-13.

The Court was impressed with the fact that the statute provided the licensee an immediate hearing. Here, as we have seen there is a substantial delay. The Court also considered important that the duration of any potentially wrongful deprivation was 90 days. Here, it is substantially longer.

In fact, the penalties in Florida exceed those in other states with license suspensions. A refusal results in a one year to 18 months suspension. Drivers with an unlawful blood alcohol level receive a six months to one year suspension. For example, in North Carolina the suspension is for ten days. *Henry v. Edmisten, supra*, 340 S.E. 2d at 723. In Illinois, the suspension for driving with an unlawful blood level is three months and for a refusal six months. *People v. Esposito, supra*, 521 N.E. 2d at 876. Similarly in Ohio the potential duration of an erroneous deprivation is, at most, 90 days. *Gonzales, supra*, 595 F. Supp. at 387.

Florida's statutory scheme is particularly harsh in that the suspension remains in effect even if, in the collateral criminal proceeding, a court finds no probable cause for the arrest or a jury finds the defendant not guilty. In California, the Department of Motor Vehicles is required immediately to reinstate an administratively suspended license if the person whose license was suspended wins an acquittal of the DUI charges *Claxton v. Zolin*, 8 Cal. App. 4th 553, 10 Cal. Rptr. 319 (Cal. App. 5 Dist., 1992). In Arkansas, the temporary driving permit does not expire until the time of trial. *Liggett v. State*, 832 S.W. 2d 813 (Ark. 1992).

The Court then analyzed the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used. In this regard, the Court considered that the prompt postdeprivation review in Massachusetts obviated this danger. In addition, the statute required that the driver's refusal be witnessed by two officers. There is no such requirement in Florida. In a state with so many immigrants and tourists, such a requirement may serve to insure that a language barrier is not substituted for a real refusal.

The Court in *Mackey v. Montrym* then proceeded to the third step in the Eldredge balancing test: to identify the government function involved and weigh the state interests served by the summary procedures used, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought. It is recognized that the state has a paramount interest in preserving the safety of its highways. The summary suspension may encourage the taking of the breath test and promptly remove noncooperating drivers from the roads. A postsuspension hearing can be used as a dilatory tactic, but so can most rights enumerated in the bill of rights.

Other states have passed on the constitutionality of statutory schemes similar to 322.2615. No Florida case has expressly ruled on the constitutionality of the statute. *State Department of Highway Safely and Motor Vehicles v. Scott*, 583 So.2d 785 (Fla. 2nd DCA 1991) and *State of Fla DHS and MV v. DeShong*, __ So.2d __ (Fla. 2nd DCA 1992) [17 FLW D 1909] do not discuss the constitutional issues. In *Heddan v. Dirkswager*, 336 N.W. 2d 54 (Minn. 1983), the court approved a statutory scheme similar to Florida's statute, but with crucial differences. In Minnesota, the driver, if employed, was able to obtain a limited license and, after an adverse administrative decision, had a judicial review hearing in less than 60 days after arrest. Under Minnesota law, the police officer must afford the driver a reasonable opportunity to consult counsel before opting to test or not to test. 336 N.W. 2d 57. The licenses are suspended for a shorter period of time than in Florida.

Yet the most important difference between Massachusetts and Minnesota on the one hand and Florida on the other is the type and the timing of the review afforded under each system. In the former administrative review is prompt, informal, and is designed to remedy obvious errors. 336 N.W. 2d 58. Judicial review is available within 60 days. And this is not a limited, appellate-type review as is afforded in Florida, but one in which the licensee can litigate the entire matter *de novo*. As the respondent in this case has pointed out, certiorari review is limited to determination of whether procedural due process was accorded, whether the essential requirements of law were observed and whether the administrative decision is supported by competent substantial evidence. Brief of Respondent, p. 5 citing *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982). The *DeShong* case, *supra*, says ``[a]pparently, the statute contemplates that issues relating to the lawfulness of the stop and any potential right to suppress evidence will be resolved under the second issue [322.2615(7)(b)2] concerning the lawfulness of the arrest." (17 FLW at D 1910]. Respectfully, the statute does not make this apparent at all.

In *Thomas v. Fiedler*, 700 F. Supp. 1527 (E.D. Wis. 1988), the district judge struck down Wisconsin's statutory scheme similar to ours, but also with important differences. The licensee had no right to subpoena the arresting officer for the administrative hearing. In Wisconsin, the

hearing examiner would review arrest report which were unsworn. In Florida, these are sworn, but the examiner routinely considers unsworn reports, such as the DUI Test Report.

However, there were several factors which afforded the driver greater due process under the Wisconsin statute. The standard of proof was stricter: to uphold the suspension, the examiner must find to a reasonable certainty by clear, satisfactory, and convincing evidence that the statutory criteria had been satisfied. Most importantly, there was again a provision for prompt *de novo* judicial review.

In *Thomas v. Fielder*, 884 F.2d 990 (7th Cir. Wis. 1989), an appeal by the State of Wisconsin was dismissed because Wisconsin's Legislature amended its statutory scheme to conform to the district court's objections. This amendment affords the driver even greater due process under the Wisconsin statutory scheme.

Under the amended Wisconsin statute, the arresting officer may be subpoenaed to appear at the administrative hearing, the hearing officer must consider the reliability of all the evidence presented at the hearing, and the arresting officer's statements and reports are to be weighed according to the ``same standards of credibility applied to all other evidence."

Contrary to the Florida statute, the amended Wisconsin statute does not limit judicial review to any specific issues of inquiry. The reviewing court may also issue a stay of the suspension while pending judicial review.

Likewise in Missouri, the driver is granted a trial *de novo* with the circuit court. 302.505, RSMo (1986). *Diehl v. Director of Revenue,* __S.W. 2d __ [1992 WL 202413] and *Koenneker v. Director of Revenue,* 833 So.2d 875 (Mo. App. E.D. 1992)

The respondent has not cited a single state in which a statutory scheme similar to Florida's has been approved after constitutional challenge. The only time a licensee can challenge the suspension is at an administrative hearing presided by civil service employees with a minimum of a high school education. These examiners have no legal or judicial training. It would be different if this hearing were designed to be a prompt, informal review to correct obvious errors to be followed by a more formal judicial review to consider such issues as probable cause, the legality of the arrest and whether in fact there was a refusal.

In *Mackey v. Montrym,* the only basis for a prehearing suspension was a refusal. Under §322.2615, the license of a driver who fails a breath, urine or blood test may also be suspended. The legal challenges to the scientific evidence in those cases all have to be tried at an administrative hearing before an examiner with little formal education and no legal training. *Treiman v. State ex. rel. Miner,* 343 So.2d 819 (Fla. 1977) recognized the importance of education and training in the judiciary.

Finally, judicial review in Florida is limited to certiorari review in the circuit court, totally bypassing the county court which tries the criminal aspect of most DUI cases. There is no time limit on the circuit court to render a decision as this case unfortunately demonstrates. In Dade

County, by administrative order, certiorari review is done by three-judge panels which naturally causes greater delay than a decision by a single judge. With no procedure for staying the suspension and, in this case, the unavailability of a hardship license, the petitioner suffers a great deprivation even when the appeal is successful. The costs of requiring de novo judicial review with statutory time limits would be minimal and would give licensees a meaningful hearing within a meaningful time.

For the foregoing reasons, I would grant the writ of certiorari for the constitutional issues raised in this appeal.

* * *

3 Fla. L. Weekly Supp. 606a

Licensing -- Driver's license -- Refusal to submit to breath, blood or urine test -- Hearing officer's conclusion that delay of forty-five minutes between refusal and subsequent recantation was unreasonable and that test would not necessarily still be accurate after delay not supported by competent substantial evidence

ANGELA MARIE NICOLUCCI, Plaintiff, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BUREAU OF DRIVER IMPROVEMENT, Respondent. 7th Judicial Circuit in and for Volusia County. Case No. 95-30559-CI-CI. July 12, 1995. Patrick G. Kennedy, Judge.

ORDER GRANTING PETITION

FOR WRIT OF CERTIORARI

THIS CAUSE having come before the Court and the Court having reviewed the Petition and Response and hearing the Oral Argument, finds as follows:

The hearing Officer's conclusion ``that the forty-five minutes between the refusal and subsequent recantation was an unreasonable delay and I do not believe that the test would necessarily still be accurate" is not supported by competent substantial evidence. Specifically, there was no evidence presented to support this conclusion. Further, the above finding of fact is inconsistent with the authority cited by the Petitioner. See generally *Gallagher v. State*, 606 So.2d 1236 (Fla. 3d DCA 1992) (142 minutes acceptable) and *Miller v. State*, 597 So.2d 767 (Fla. 1991) (120 minutes acceptable).

The Petition for Writ of Certiorari is hereby GRANTED.

* * *

18 Fla. L. Weekly Supp. 305a
Online Reference: FLWSUPP 1803BELL

Criminal law -- Driving under influence -- Evidence -- Breath test -- Implied consent -- Where, in order to overcome defendant's hesitation to submit to breath test, officer erroneously advised defendant that if she submitted to test she would get permit to drive to work and college classes, consent was not knowing and voluntary -- Motion to exclude test results is granted

STATE OF FLORIDA, Plaintiff, v. REBECCA MARIA BELLO, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Traffic Division. Case Nos. 4187-XDK & 9425-GBB. December 13, 2010. Honorable Jacqueline Schwartz, Judge.

ORDER

THIS CAUSE, having come onto be heard before me upon the Defendant's Motion to Exclude the Breath Test Results, and the Court, having heard argument of counsel and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is hereby GRANTED and this Court hereby SUPPRESSES the breath tests obtained by the police. As grounds therefore, the Court makes the following findings of fact and law:

On November 14, 2009, Rebecca Maria Bello was arrested by officers Mark Slimak and Richard Closius of the Miami-Dade police department and charged with driving under the influence [hereafter referred to as DUI, pursuant to Florida Statute 316.193 (2009). After her arrest, the officers transported her to an alcohol testing unit in order that they could administer a breath test to her.

Once at the testing unit, Officer Slimak advised Ms. Bello of her Implied Consent rights, pursuant to Florida Statute 316.1932 (2009).

The evidence shows that Ms. Bello, mindful of this advisory, was nevertheless quite nervous, as she had never before been in such a situation. Accordingly, she expressed her hesitance to go forth and agree to submit to the officers breath test and she requested the opportunity to speak with her father, a civilain employee with the Miami-Dade police department, for advice. This request was denied by the officer as is permitted under the law. *State v. Hoch,* 500 So.2d 597 (Fla. 3d DCA 1986).

The officer then read to Ms. Bello the penalties for refusing a breath test, even though that advisory is read only when the person initially refuses to submit to breath testing. *See* MIAMI-DADE COUNTY IMPLIED CONSENT ADVISORY FORM. The officer made specific note of the suspension period that would be imposed if Ms. Bello refused to submit herself to breath testing, circling the “12 months” on the form while telling her that she “would lose her license for 12 months if she refused the breath test.” When she inquired if she was going to jail, the officer advised her that she was going to jail “either way.”

Officer Slimak then told Ms. Bello that if she submitted to the breath test, she would "get a permit" to drive to the school where she taught pre-kindergarten students and to attend her college classes.

To Ms. Bello, a student and teacher, this was obviously very important and heavily tilted the scales in favor of her submitting to the breath tests.

Certainly, any person who accepts the privilege of operating a motor vehicle in this state is deemed to have thereby given consent to submit to an approved breath test, once placed under lawful arrest, to determine whether he or she operated said vehicle while under the influence of a controlled or chemical substance. Florida Statute 316.1932. *Breath* tests may be requested at any time by law enforcement under this chapter. *Id.* However, a driver has the legal right to refuse consent to a breath test. *Id.*

Several courts have addressed the violation an erroneous opinion or statement can cause a driver's right to due process, even if it was not the officer's intent to mislead or coerce the defendant into submitting to a breath test. These cases have concluded that incorrect legal conclusions and/or false promises made by the police will result in either the exclusion of the tainted evidence.

For instance, in *Olinger v. Commissioner of Public Safety*, 478 N.W.2d 806 (Minn. App. 1991), the court held that erroneously threatening the driver that he could be subject to criminal penalties upon refusal to consent to chemical testing violated his right to due process, resulting in the court's disregarding the fact that the driver in fact took and failed the breath test.

The *Olinger* court went on to hold that "[t]he improper threat [alone] constitutes the violation." *Id.* at808 (emphasis supplied). *Accord State v. Sells*, 798 S.W.2d 865 (Tex.App. 1990) (police erroneously threatening driver with incarceration for refusing breath test improperly coerced him to submit to the test); *State v. Tucker*, 26 Fla.Supp.2d 88 (Fla. Palm Beach County Court 1987) (police false promise to *unarrest* the driver if his breath test results were below .05% improperly coercive, warranting exclusion); *State v. Henry*, 15 FLW C21 (Fla. 15th Jud.Cir. 1990) (results of breath test properly suppressed where the officer erroneously threatened the driver that if he refused to submit to the breath test he would be incarcerated over the weekend). And *see generally State v. Kozel*, 505 A.2d 1221 (Vt. 1986); *and People v. Moncton*, 547 N.E.2d 673 (Ill.App. 1989).

In *State v. Ellis*, 9 Fla. L. Weekly Supp. 275[a] (Fla. 10th Jud. Cir. 2002), the arresting officer advised the defendant that his privilege to drive would be suspended for twelve (12) months for a first refusal or eighteen (18) months for a second or subsequent refusal to submit to a breath test. However, Mr. Ellis did not possess a Florida driver's license; he was driving in Florida with a Tennessee driver's license pursuant to the reciprocal agreement that permits out of state drivers to drive in a foreign state. In suppressing the breath test results, the courts, both trial and appeals, held that "[b]y misrepresenting that if he refused the breath test his driving privileges in Tennessee would be suspended, the police officer tainted the [defendant's] consent to take the breath test." *Id.* at276.

In a case very similar to this one, the defendant was advised by the officer that if she submitted to the breath test, she would be entitled to obtain a hardship driver's license. In suppressing her test results, the court held that this "advice" was coercive and therefore improper, and that her consent was not knowing or voluntary. *State v. Forman*, 10 Fla. L. Weekly Supp. 47[a] (Fla. 11th Jud. Cir. Cty. Ct. 2002). *See also* *State v. Perdue*, 17 Fla. L. Weekly Supp. 186[a] (Fla. 16th Jud. Cir. 2010) (where officer misinformed the defendant that he would be eligible for a hardship license if he submitted to a breath test but that he would not be eligible for a hardship license if he refused said test, submission to the breath test was not voluntary); *State v. Johnson*, 6 Fla. L. Weekly Supp. 236[a] (Fla. 18th Jud. Cir. Cty. Ct. 1998) (where arresting officer told the defendant that if he passed the tests the DUI would no longer exist and that he would not be required to post bail or wait in jail for eight hours, officer's statements were misleading and improper); *State v. Krantz*, 4 Fla. L. Weekly Supp. 325[a] (Fla. 15th Jud. Cir Cty. Ct. 1996) (results of breath test suppressed where the officer refused to allow the defendant to use the restroom facilities until he first blew into the breath machine); *State v. Rome*, 7Fla. L. Weekly Supp. 405[a] (Fla. 11th Jud. Cir. Ct. Court 2000) (statement by police officer that if the defendant submitted to the breath test he would *only* be charged with a misdemeanor, which implied that he would be charged with a felony offense if he refused the tests, improper).

It is not required that the officer's enticement was made in bad faith in order for this court to suppress the results of Ms. Bello's breath test results. In *O'Dell v. State*, 409 S.E.2d 54 (Ga.App. 1991), the court, in addressing the police's failure to make reasonable efforts to accomodate the defendant's independent blood test request, found that "[though] the officer acted in good faith, [this] does not change th[e] conclusion [that the accused never received his independent test], for it is the *objective* result of the officer's conduct rather than his *subjective* good or bad faith that is decisive." *Id.* (emphasis supplied). The *O'Dell* court added:

It makes no difference whether the officer made an innocent mistake [b]ecause the end result was that the appellant was unable to have an independent blood test.

Id. (emphasis supplied).

It is wholly irrelevant then whether Officer Slimak's enticing representation to Ms. Bello was made in good faith.

* * *

PREPARING A SUCCESSFUL DUI CASE: PROVEN IDEAS ON ACQUIRING EVIDENCE, CHALLENGING EVIDENCE, AND MEANINGFUL INVESTIGATION OF A DUI CASE

Presented by:

Michael A. Catalano, Esq.
MICHAEL A. CATALANO, P.A.
1531 N.W. 13 Court
Miami, FL 33125
305-325-9818, Fax 305-325-8759
Email: MCatalanoLaw@gmail.com
MichaelACatalanoPA.com

Before you can prepare a successful DUI defense, you must be properly prepared for trial. Motions are only part of a game plan. You must be both *factually* and *legally* ready for trial.

First, look for creative defenses as well as traditional defenses.

Creative Defenses need to be explored the day you are hired. DO NOT LET EVIDENCE DISAPPEAR!

PHOTOS, PHOTOS, PHOTOS:
Take lots of digital photos of the car, the scene and the client. If client did finger to nose, examine shoulders on client to see if they are symmetrical.
In accident, do ENTIRE scene. Look for head trauma and windshield damage or just a smudge. Digital photos are free. Take too many!

911 CALLS/POLICE TAPES, BOOKING PHOTOS AND BOOKING AREA VIDEOS:
Order it all IMMEDIATLEY upon being retained. 911 calls usually tell you what really happened. See Appendix H below.

WEATHER DATA:
See if the weather helps you. Was it windy, cold, or wet?

First use a free web site such as: http://www.wunderground.com
or http://www.ncdc.noaa.gov/oa/mpp/freedata.html
Then, if needed, get a certified weather report from National Climate Data:
http://www.ncdc.noaa.gov/oa/ncdc.html

GRASS TOO HIGH:
If client did FSE's on side of road maintained by a government agency, get the records to see when the grass was cut.

GPS FROM POLICE CAR, CLIENT'S CAR/BOAT ETC.:
Make a public records request, pursuant to Chapter 119, Florida Statutes for the GPS data from the police car. Not all police cars have GPS recordings. Just ask!

FDLE TAR REPORT:
If the police walk up to the car and know all about your client before he or she says a word, ask them later and they usually tell you that it never happened that way. The TAR report may show they are not telling the truth. See Appendix I below.

LOCAL TRAFFIC SIGNAL OFFICE
Was the signal light malfunctioning? The county usually keeps records of all signal malfunctions.

CELL PHONE RECORDS AND RECORDINGS:
Did your client call anyone or leave any messages before, during or after arrest? If so, save them. Ask for detailed billing to show that client was talking and not DUI.

DID YOU GET INVOLVED AT ARREST TIME?:
Ethics rules say you cannot be a lawyer and a witness. Know when to be one or the other. Gather evidence. Audio, video, etc.

SECURITY CAMERAS:
You never know who is recording. If your police department does not video, ask for booking area videos etc. Many times there are multiple police cars video taping. Do not assume…. Ask!

MEDICAL RECORDS:
Get all records, MRI's, XRays etc. There is nothing like a photo of a pin in your client's ankle to show why he can not walk heel to toe. Ask doctors to release entire file.

INSURANCE COMPANIES:
Do not allow client to speak with adjusters unless the company agrees in writing that the statement is privileged, work product and will not be released without a court order and notice to you so that you can object. Use a letter that makes your insurance company your agent. Make all statements by your client privileged, and work product. Did the client call the insurance company from the scene? Any tape of the call? See Appendix J below.

CREDIT CARD RECEIPTS:
Be careful here. Sometimes detailed credit card receipts will only hurt your case. When client says he only had two glasses of wine, look for verification. Don't be surprised when the bill verifies way too many drinks were purchased.

PERSONNEL FILES ON COPS:
Get the IA and personnel files. Although bad acts in the past are not admissible, a history of misconduct may be admissible if you can show a M.O. Then, seek cops who hate the cop who may testify about the cop's reputation for dishonesty. Sometimes, divorce files are the best place to look

FLIP YOUR CLIENT:
Yes, there are times where your client may have "juicy" information a prosecutor or cop really wants and would then help you get a deal. See Appendix K below.

ROLL ON SOMEONE ELSE:
What if you or your client can help the government prosecute someone else for something unrelated?

WAS OTHER DRIVER AT FAULT?:
Generally, the other driver's comparative negligence or intoxication are not relevant in a DUI case but, can be if it shows that they are the sole proximate cause of the accident or it goes to their ability to remember and relate what happened.

USE THE CIVIL CASE TO YOUR ADVANTAGE:
Is the injury to the victim not "serious" enough? In criminal court, we generally have no right to "inspect" the victim or do medical tests. We do have the right to see the medical records but, cannot order an IME (independent medical exam). In civil court, you bet your bippy you can get an IME and all kinds of stuff. Consider entering an appearance in civil court and going for it!

BREATH DOCUMENTS:

This is being discussed by others in this seminar in detail. Simply put, print out and look at all documents about the damn machine your client blew into.

The typical and atypical DUI case:

THE RULE: Have a **game plan** and stick with it from pre-trial preparation, through the first part of voir dire to the end of closing argument.

Do NOT assume they will give you a great plea offer JUST BECAUSE the BAC is under .08…. get ready for a fight.

I. Pre-Trial Strategy

A. Meeting with the client

DUI cases are truly an "all or nothing" situation for the client. If you win, the client is happy and no matter what happens with the implied consent hearing, if

any, or any accompanying infractions, the client feels that he or she "got their money's worth." If you lose, the client ends up sitting in DUI school with all those other people who lost whether or not they hired an attorney. It is therefore important to educate the client by stressing right from the first meeting that if convicted, he or she may get the same or a worse sentence than some unrepresented person got for simply pleading guilty at arraignment.

Explain all of the ramifications, (include increased car insurance premiums and recidivist sentencing provisions of Florida law), so that your client knows "up front" the importance of going to trial. At the first meeting with the new client also let the client know that a jury trial may be the only way he or she can leave court without being convicted.

Too many clients feel that a DUI case is something that should be simply left the attorney to handle. It is best to have the client intimately involved with the defense **game-plan** from the outset. Let the client know that you and he or she must be prepared to go to trial if it is in his or her best interest.

B. Get the Client involved

There are many pre-trial concerns that should be handled by the defense attorney with the client's help, such as:

1. Have the client photograph the arrest area and the locations where any physical tests were performed. Do a video if it will help.

2. Have the client assist in locating and interviewing potential witnesses.

3. Examine the car in question. Photograph the car and any of its parts that may affect or relate to potential issues at trial. Have photos taken to corroborate as much defense testimony as possible. For example, if the age and mileage of the car are at issue, photograph the odometer and the license plate.

4. Get medical information about the client. Use a medical history checklist. If the client has medical problems that might affect his or her performance on physical tests, speak with the client's doctor and get medical records to back it up. Be ready to demonstrate in open court, that your client is telling the truth. The best and cheapest way to prove up medical problems is by introducing medical records via the record's custodian. (Make sure they don't mention alcohol issues!)

5. Be careful how you handle the issue of prescription or "over the counter" drugs that the client may have been taking at the time of the arrest. The first questions that should be addressed is, "Is the drug an enumerated drug covered by Section 316.193 or Chapter 893 of the Florida Statutes?" There is a long list of drugs in those chapters. Find out if the drug your client was taking is listed in the Statutes. Be sure to check for the drug under the appropriate generic, medical name used in the statutory chapters enumerated above . If not, is the drug

covered in sec. 877.111 Florida Statute? Believe it or not, driving under the influence of fiberglass resin (methyl ethyl ketone) is illegal under Fla. Stat. 877.111. The statute also has a "catch all" phrase to cover non-listed drugs or substances. The phrase reads, "or any other similar substance for the purpose of inducing a condition of intoxication or which distorts or disturbs the auditory, visual, or mental processes." Sec. 877.111 (1) Florida Statutes. I suggest you run all drugs by an expert before you disclose anything.

Look up the drug in the (P.D.R.), (Physicians Desk Reference) and see what its side affects are and how it interacts with alcohol. I also use the Consumer Reports Drug Book. You can also simply go to the official web site for the drug in question and get the information right from the manufacturer. Most clients think that they can drive under the influence of any drug as long as it was prescribed by a physician. Don't let your client take the stand if he has to admit that he violated the law by driving under the influence of a drug or substance unless you are absolutely sure that it is not listed.

If the client is taking prescription drugs, get a copy of the vial, and a complete copy of ALL medical records. Do not disclose this to the prosecution until AFTER you have evaluated the medical reports and if some are from emergency rooms or hospitals, have a nurse read them and translate what they are saying. Be careful for notes about “alcohol abuse or “drug abuse.

6. Get a copy of the videotape, if one exists, and show it to the client before any depositions are taken. It's amazing how much a client will remember once he or she sees himself or herself on the videotape. Have the client explain to you what was happening in the videotape room. Even though the police have routine procedures, they rarely follow them "word for word".

7. If there's a breath/alcohol reading, know everything possible about the client's medical history concerning his lungs and digestive system so that you can show the jury that your client has medical problems that resulted in an inaccurate reading. Lung cancer, HIV and other problems and taking modern medicines to correct those problems may have an effect on the reading. Gastric surgery has been liked to crazy BAC levels.

8. If the case involves refusal of consent to take the breath test, discuss with your client why he or she refused. Tell him or her reasons why other defendants have also refused to give breath samples. Most of the Defendants who refuse to give a breath sample have some reason such as, "I've heard that they are unreliable"... tell the client why his or her reason(s) have validity.

9. If your client swears that he only had "a few beers" or something similar, try to get credit card receipts or other documentation to prove that he is telling the truth.

C. Know what you're up against!

1. Civilian Witnesses. Learn all you can about your client's accusers. Try to get permission to depose all state witnesses before trial, if you can. Rule 3.220, Fla. R. Crim.P. has limitations on the taking of depositions.

It is tough to know a lot about the case before trial unless you reach out to the witnesses and ask them what happened. Write to and call civilian witnesses on the phone and ask them what happened. Tell them all about the DUI law. Most people don't know how much your client could legally drink before he or she drove his car. Let them know the serious ramifications of a DUI conviction. Explain the heavy burden the State has to meet before your client can be convicted of a crime such as DUI. Answer their questions.

If the civilians tell you facts that you want to preserve, ask them for permission to tape record their statement over the phone. Make sure they again consent to being tape recorded at the beginning of the tape recording. (It's a felony to tape without permission and you can not use it for any purpose).

In DUI accident cases, the perspective of a civilian witness will often be molded by the witness(es) initial meeting or conversation with counsel for one of the parties. It is important to attempt to contact the witness prior to contact by opposing counsel. Witnesses will be more cooperative if they perceive you as friendly and feel that you are approachable. Even under the worst fact pattern, you can still have a good relationship with an adverse witness. If they tell you that the young and [stupid] prosecutor told them not to speak with you, ask them to say just that on tape and take it to the judge. That is a serious violation of Rule 3.220.

If the civilian witnesses were involved in the charged accident, ask them if there is anything you can do to help them settle the civil aspects of the case. Most civilian witnesses need help with the insurance aspects of the case. Try to guide them, within ethical bounds. Sometimes it is even wise to apologize on behalf of your client for causing the accident. Many "accident victims" only want to hear that they were "clearly not at fault" and that someone says…"I'm sorry." Once they hear that they were not at fault, they will not try so hard to "stretch the facts" to help convict your client. If they have a civil attorney, contact him or her and try to work with him or her to settle the civil aspects of the case. Be sure to make it clear to the witnesses that you cannot represent them and that your first loyalty is to your client. Make sure you don't ask them to do anything improper in exchange for their testimony. DO NOT AGREE TO SETTLE WITH ANYTHING that could even look like a deal to keep them from testifying in the criminal case. There is nothing unethical about talking with the State's witnesses. You can get in big Florida Bar trouble for making any offer that looks like you are trying to “buy” justice. See *Bar v. Machin*, 635 So. 2d 938 (Fla. 1994). (attached to these materials).

2. Police and State Experts.

Even if you are denied a deposition of the officers, you can still try to talk with them about the case. Many officers will tell you about the case if they feel you

are not a threat to them or their job. Try to catch them in the courthouse hallway or on the street. Don't try to take a tape recorded statement of a police officer. Do try to get them to tell you what they did in the case.

State chemists and alcohol experts vary greatly in their training and knowledge. On one end of the spectrum, a breath device operator may only know how to run the machine properly. That witness will deny any scientific knowledge about alcohol and how it affects the human body.

On the other end, the witness may be highly trained and scientifically knowledgeable. Regardless of where the state's expert fits on the spectrum, you should know that witnesses prior testimony and be prepared to cross examine him or her. Make sure you check every document he supplies you to see if the testing in your case was done "substantially in accordance with H.R.S./F.D.L.E rules and regulations."

3. Hire the right experts. You may just keep the State from getting to them.

4. They can test blood later for marijuana. Be careful. You may not like what you find out if you complain too much.

EFFECTIVE PRETRIAL MOTIONS:

II. Pretrial Motions

It is important to note that you must make every possible pretrial motion to suppress or dismiss unless you don't want to "tip your hand" to the state about an error they had overlooked so far. A motion to suppress or exclude should not be filed if you think that the State has missed the error and, by your disclosure, they can correct the error before trial.)

On the other hand, try to argue your technical suppression issues *before* trial. During the trial, you can object "pursuant to the issues raised pre-trial". Juries wonder why you spend so much time at "side bar" and no matter what you say to the judge, the evidence is allowed to be introduced. Minimize the amount of time you have to spend during the trial, arguing legal issues. Let the jury think that you are winning on most of your legal points. Juries like to think they voted the same way the judge would have voted.

Consider not moving to suppress a BAC under .08. Juries wonder why someone is on trial with such a low reading.

If your client looks less than impaired on the videotape, you want the judge to see it before the jury trial. In close calls on legal issues during the trial, many judges will lean toward the side they think should be victorious.

Kinda serious injuries to victims? Consider a sworn motion to reduce. Attached is an example. See *State v. Schreiber*, 835 So. 2d 344 (Fla. 4th DCA 2003). (Attached to these materials)

Sample motions to suppress/reduce are attached to these materials.

Areas for motions in liminie:

1. Cop can not say pass or fail.
2. Cop can not say he only arrests some of those he tests: *McKeown, v. State*, 34 Fla. L. W. D1689 (Fla. 4th DCA Aug. 19, 2009).
3. HGN not admissible or limit its damage.
4. ASA can not argue that impairment means "diminished" or "weakened" faculties. *Shaw v. State*, 783 So. 2d 1097 (Fla. 5th DCA 2001).
5. ASA can not comment on demand for attorney or silence. Watch out for video's where questions are asked and client simply stays silent.
6. Breath test admissibility. (Covered by other speakers at this seminar)
7. *Clark/Trauth/Llamas* issues. What exactly did the cop say to your client to get him or her to blow or give blood or urine. Use this quote in *DHSMV v. Clark,* 974 So. 2d 416 (Fla. 4th DCA 2007):

> The state acknowledges, but attempts to minimize the error in the warning given Clark in this case; however, the error may have misled Clark into thinking that she would have to submit to a more invasive test, the withdrawal of blood, than was authorized by the statute. We accordingly conclude that the circuit court did not depart from the essential requirements of law in holding that, where the officer's warning did not comply with the statute, Clark's license could not be suspended under the statute.

8. Urine is useless and results not valid.
9. In Felony 3rd , attack priors. Did client have a lawyer on prior cases?
10. Hearsay, object to documents that prove up machine.

III. Bench or Jury...A big decision! (If they even go bench in your town)

Whether or not to waive a jury trial in lieu of a bench trial is probably the single most important decision you and your client will make. Make sure your client knows all the reasons why one form of trial might be better than the other. Clients don't like to be told that they should go bench because the judge is an old friend and wouldn't harm his client. Those comments can get you in trouble if your client is convicted by the judge, despite your old friendship.

If your client has made a refusal and the videotape is favorable, it may be a good idea to proceed to a bench trial. Cases involving high blood alcohol level readings (for example, .12 and above), should usually be taken to a jury trial, as most judges are reluctant to acquit at bench trials. Most judges are afraid to acquit

a defendant with a high reading even if they have a reasonable doubt. Remind a judge during a bench trial that he should view the facts using the same standards that would apply to a jury. The judge should be reminded that his verdict must be not guilty if he has any reasonable grounds for a doubt as to the guilt of the accused. Tell the judge that even if he thinks the Defendant may be guilty, he must acquitted because there is a reasonable doubt.

In deciding whether or not to waive jury, the most important consideration is how the judge has ruled in the past. If you don't know the judge well, ask other lawyers, clerks, court reporters and bailiffs who do. Ask them how they think the judge will handle a bench trial as opposed to a jury trial. Hopefully they will tell you what they think.

Remind the client that you can not guarantee a favorable result in either a bench or jury trial. Sometimes you have to follow your heart and make a risky decision. If in doubt, go jury!

IV Voir Dire

The GAME PLAN starts here. It is your theory of the case. Typically it is a game plan of not enough evidence to convict or a reasonable doubt. Juries are going to assume your client was drinking. Focus them right from the beginning that the real issue is how impaired the client is or is not. Other than special areas of interest that are relevant to the case at bar, there are some areas that must be explored in every DUI trial.

1. How alcohol (or drugs) has affected the juror's life. Prior DUI, alcohol or drug arrests of the juror or anyone the juror knows, what happened to the case? If it was a recent local DUI arrest, get the juror to talk about the ramifications of the conviction and punishment. Alcohol and drugs are hot topics of conversation. Find out how each juror feels about the subject...in detail.

   a. MADD or SADD member?
   b. Friend or relative hurt or killed by a DUI anywhere?
   c. See TV shows or read about DUI's?
   d. What they know about Florida's DUI law?

2. Let the jurors know that DUI is a crime of "degree" and that not all drinkers are guilty just because they drive a car thereafter. Some jurors think that drinking any amount of alcohol and driving means that the Defendant is guilty. Get the jurors to agree that they will follow the judge's instructions on how much the Defendant could drink before he breaks the Florida DUI law and becomes a "criminal" in the eyes of the law.

At the same time, discuss the reasonable doubt standard and how it should be used in a DUI case.

Make sure you ask questions that cover your "theme" or "**game plan**" for the trial.

V. Opening Statement

In opening statement, tell the jury what your theory or **game plan** will be during the trial. Do it soon… do not wait. In most DUI cases, there is no doubt that the Defendant drank something. Here are some typical defense game plans for DUI cases:

l. He drank, but not enough to violate the law.

2. His normal faculties were not impaired from alcohol alone. Other outside influences affected his normal faculties, such as sickness, lack of sleep, or age. The State has to prove that the alcohol, alone affected your client, to the extent that he lost control of all of his normal faculties.

3. If the State mentions the breath reading, tell the jury why the breath reading is not an accurate indicator of the client's blood alcohol at the time he was behind the wheel.

4. If the State mentions a blood reading, give the jury some information about why the blood reading was not properly taken and/or analyzed.

5. If your client looks and acts drunk on the video, explain to the jury that if any one normal faculty was not impaired from alcohol ingestion alone, they must acquit him.

6. Give reasons why your client didn't drive his car in a "perfect" manner.

7. Remind the jury that you can not present "your side" of the case until after the State rests. Ask them to keep their minds open.

VI. The Trial

FUNDAMENTAL RULES

A. Call it "drunk driving" and not "impaired driving".

B. Never call your client a "Defendant" in front of a jury.

C. Act positive and give the jury the feeling that you too are there to "seek justice" and not just to "get the client off".

D. **Never** waive opening statement.

E. Show as many diagrams and photographs as possible to prove your points.

F. Let the jury know that the judge can punish your client on the infractions and implied consent hearing, in any, whether or not they find your client guilty. (Jurors have told me that they were close to convicting but, figured that the judge would "hammer" the client on the infractions and the client "already" lost his license so, they let him or her "go."

G. Remind the jury that this is a serious charge, otherwise there would not be the right to a full blown jury trial. This is not "traffic ticket court".

MOST IMPORTANT OF ALL...

H. Follow your theme or **game plan**. Your presentation at each stage of the trial should work toward the theme or game plan.

Here are some ideas or concepts that may help during the trial:

I. Refusal cases. Tell the jury ***why*** your client refused. Steal the prosecutor's thunder by explaining the perfectly plausible reason your client had for not giving a breath sample.

Get the witnesses to admit that there were some, if not all of the client's "normal faculties" that were not impaired solely from the ingestion of alcohol. If your client looks good on the videotape, get the witnesses to admit that your client really didn't change his level of intoxication from the arrest scene to the video scene a short period later. If the witnesses say your client "sobered up" greatly, discuss the small amount of alcohol that can be absorbed during the period of time it took to get your client before the video camera.

2. Actual Physical Control Cases. The "actual physical control" law is frequently misused by prosecutors. The intent of the law was to help prosecute defendants who are involved in accidents and there is no witness available to prove that the defendant was driving drunk. The way the jury instruction reads, any "drunk" who has exclusive control over a car should be convicted.

Politely take your keys out of your pocket and throw them on the table in front of the jury. Tell them why you should not be convicted, if you were drunk, for being in actual physical control merely because you have the keys to a car that is in a parking lot somewhere else.

3. In cases with a breath reading.

a. Over .08: Ask one big question: Officer, what exactly was my client's reading when you stopped him or her? Go "bowling for error factors". Show the jury the "bowling sheets", otherwise

known as the "log sheets". Show them how often the "machine" makes mistakes.

Keep calling it a machine, not a "scientific instrument". BRING AN EXPERT to explain the machine's faults. Never call that "thing" an "instrument." Call it a "machine."

b. Under .08: Do not underestimate such a case. There are jurors who would convict a ham sandwich.

4. Catch the officers in a lie. Read your citations carefully. Frequently, the arresting officer "certifies" on the face of the uniform traffic citation that the infraction of "failure the remain in a single lane" was committed at the following place... If you look and listen carefully, the officer certifies that your client committed an infraction at the location of the traffic stop. Jurors know that peoples lives, and insurance rates, are greatly affected by what a officer writes on a ticket. Show that what the officer wrote on the ticket is not so.

5. Break the law down to its basic parts and show why each part must be violated in order to obtain a conviction.

a. **Driving:** Unless someone testifies that they saw your client driving, don't admit it. The witness who can put your client "behind the wheel" may not be available and you don't want to stipulate or agree to anything.

b. **While under the influence of alcohol and/or drugs:**

Everyone who drinks *any* amount of alcohol and thereafter drives a car is "under the influence of alcohol". Usually, its best to admit that your client was "under the influence". That shifts the main issue to the difficult fact to prove, i.e. that your client was under the influence to a certain extent.

c. **To the extent that his normal faculties were impaired:**

The statute says "faculties" in the plural. Tell the jury that the State must prove that all of your client's normal faculties must have
been impaired solely from the ingestion of alcohol. If the State fails to prove any single element, they must find your client not guilty.

d. **In a certain county, in the state of Florida:**

Again, don't waive anything. The State may forget to prove venue and jurisdiction. Oooops.. JOA!

6. How to handle Physical Sobriety Tests:

Standard police physical sobriety tests only test "**abnormal**" faculties.

Your client is charged with driving under the influence to the extent that it affected his or her **NORMAL** faculties. Ask the officer if it is normal for people to walk heel to toe or touch finger to nose. Ask him if he does those physical tests at the dinner table at his house.

Show the jury how demanding the officer was when he asked your client to touch his finger to his nose. Show the jury how easy it is to fail the tests in the officer's opinion.

Remember, these are the only tests your client will ever take in his life where he can not practice and if he fails, he gets a free trip to jail. Paint a picture for the jury of your client, nervous and afraid, standing next to an armed police officer, police lights flashing, people staring at him and all of a sudden, it's his turn to perform the tests or go to jail. Even a trained actor would have trouble under those circumstances.

CLOSING ARGUMENT:
Last but not least, even if the client gets convicted, hold your head up high because you did everything possible to protect his rights under our system of justice!

Appendix to Materials:

Appendix A:

ETHICS:

If you only have time to read one single ethics case, read this one:

Supreme Court of Florida.
THE FLORIDA **BAR**, Complainant,
v.
Manuel A. **MACHIN**, Respondent.
No. 79369.
April 21, 1994.

In disciplinary proceeding, the Supreme Court held that offer on behalf of client to set up trust fund for one victim's child if victim and other victim's family do not speak in aggravation at client's sentencing hearing is conduct prejudicial to administration of justice and warrants 90-day suspension.
So ordered.

West Headnotes

[1] KeyCite Notes

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k58 k. Punishment. Most Cited Cases

Offer on behalf of client to set up trust fund for one victim's child if victim and other victim's family do not speak in aggravation at client's sentencing hearing is conduct prejudicial to administration of justice and warrants 90-day suspension. West's F.S.A. Bar Rules 3-4.3, 4-8.4(d).

[2] KeyCite Notes

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(2) k. Standards, Canons, or Codes of Conduct. Most Cited Cases

When confronted with possible ethical conflicts, it is lawyer's obligation to look to rules of professional conduct and discipline for guidance.

***939** John F. Harkness, Jr., Executive Director, and John T. Berry, Staff Counsel, Tallahassee, and Susan V. Bloemendaal, Asst. Staff Counsel, Tampa, for complainant.
Donald A. Smith, Jr. of Smith and Tozian, P.A., Tampa, for respondent.

PER CURIAM.
Both The Florida **Bar** and the respondent seek review of the referee's report in this attorney-disciplinary action. We have jurisdiction [FN1] and adopt the referee's recommendations as to guilt and discipline.
FN1. Art. V, § 15, Fla. Const.

The **Bar** filed a two count complaint against the respondent, Manuel A. **Machin**. We accept the referee's recommendation that **Machin** be found not guilty of the violations alleged in count I of the complaint. Thus, we are concerned here only with the allegations contained in count II.
In count II, the **Bar** alleges violation of the following Rules Regulating The Florida **Bar**: 3-4.3 (the commission by a lawyer of any act that is unlawful or contrary to honesty and justice); 4-3.4(f) (a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party); and 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). The alleged violations occurred during Machin's representation of Nelson Gonzalez.

Gonzalez had been charged with the first-degree murder of Samuel Sierra and the kidnapping of Sierra's girlfriend, Susan Schultz. At the time of the murder, Ms. Schultz was pregnant with Sierra's child. As part of a plea agreement, Gonzalez pled guilty to second-degree murder. At various times prior to the sentencing hearing, Machin offered, on behalf of his client, to set up a trust fund for Ms. Schultz's child in amounts up to $30,000. The trust fund would be set up for the child only if Ms. Schultz and Sierra's family did not speak in aggravation at Gonzalez's sentencing hearing. Machin feared that if the victim's family spoke in aggravation, the sentencing judge would impose a more severe sentence or reject the plea agreement entirely. It appears the offer was disclosed to the State Attorney's office, the sheriff's office, and the victim's assistance representative. It also appears that the sentencing judge was made aware of the terms of the trust offer. The victim's family rejected the offer, instead choosing to testify in aggravation. After hearing from the victim's family, the sentencing judge imposed the maximum sentence that could have been imposed without rejecting the plea agreement.

[1] The referee found only that portion of rule 3-4.3 relating to conduct prejudicial to the administration of justice and rule 4-8.4(d), which expressly prohibits such conduct, had been violated. In connection with these ethical violations, the referee recommends that **Machin** be suspended from the practice of law for ninety days.

The **Bar** seeks review of the recommended discipline and asks that **Machin** be suspended from the practice of law for six months. **Machin** challenges the referee's finding of guilt and the recommended ninety-day suspension. He takes the position that the **Bar** failed to prove his actions were prejudicial to the administration of justice. In the alternative, he argues that if the Court accepts the referee's finding of guilt, an admonishment is an adequate sanction.
We adopt the referee's finding of guilt and agree that "[a] lawyer who tries to buy a victim's silence at sentencing prejudices the administration of justice." The fact that the sentencing proceedings do not appear to have been affected by Machin's unsuccessful attempt to buy silence does not preclude a finding of guilt. If a showing that a particular judicial proceeding was affected by an attorney's conduct were required in a case such as this, a violation of rule 4-8.4(d) would hinge on the actions of third parties. While conduct that actually affects a given proceeding ***940** may be prejudicial to the administration of justice, conduct that prejudices our system of justice as a whole also is encompassed by rule 4-8.4(d). This conclusion is supported by the Standards for Imposing Lawyer Sanctions, which makes clear that harm to our legal system is a concern the rules were designed to address. *See, e.g.,* Introduction, Standards for Imposing Lawyer Sanctions ("injury" includes harm to the legal system).

The fact that the victim's family refused the trust offer may be considered in determining the extent of the harm caused by Machin's misconduct, when considering the sanction that should be imposed. *See* Standards for Imposing Lawyer Sanctions 3.0(c) & 6.1 (both potential and actual injury caused by conduct that is prejudicial to the administration of justice should be considered in imposing sanction). However, Machin cannot use the victim's family's refusal to accept his proposal as a shield from responsibility for his actions. It is the mere attempt to influence the sentencing determination by buying the silence of the victim's family that prejudices the administration of justice. It is not necessary that the attempt be successful because each time such an attempt is made, confidence in the legal system is lost.

As noted by the referee, the fair and proper administration of justice requires that the rich and the poor receive equal treatment before the court. A wealthy defendant cannot be allowed to buy silence and thereby gain a chance at a lesser sentence than that received by one unable to pay for silence. This is so because when “justice” can be bought by the highest bidder, there is no justice. An attorney's involvement in the transaction only serves to accentuate the prejudicial effect on the system. When one charged with the special responsibility of upholding the quality of justice attempts to buy a more favorable sentence for a criminal defendant, doubt is cast on our entire system of justice.

[2] Machin's conduct in this case is so obviously prejudicial to the administration of justice, we find it hard to believe that he claims ignorance of the impropriety of the trust offer simply because he was unable to find authority addressing the precise situation with which he was confronted. We take this opportunity to emphasize that when an attorney recognizes a certain course of conduct may have ethical implications, the fact that there is no precedent directly on point should not be considered authorization to engage in the questionable activity. As Machin notes, the Preamble to the Rules of Professional Conduct recognizes ethical problems may arise from conflicts between a lawyer's responsibility to a client and the lawyer's special obligations to society and the legal system. However, the Preamble goes on to provide:

The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

When confronted with possible ethical conflicts, it is the lawyer's obligation to look to the rules of professional conduct and discipline for guidance. While it always may not be clear that a specific course of conduct is proscribed by the rules, an attorney must use sound judgment in applying these ethical standards to a given set of facts.[FN2] **Machin's** judgment clearly was lacking in this instance.

FN2. An attorney with concerns about contemplated professional conduct also may request an ethics opinion from The Florida **Bar**. *See* Rule Regulating The Florida **Bar** 2-9.4 ; Florida **Bar** Procedures for Ruling on Questions of Ethics.

We agree with the **Bar** that **Machin** is guilty of serious misconduct. However, we believe the ninety-day suspension recommended by the referee is sufficient. **Machin** has no prior disciplinary record. He has a reputation for zealously representing his clients and for making many worthwhile contributions to his family, his church, and his community.

Moreover, there is evidence that **Machin** disclosed the trust offer to the State Attorney's office, the sentencing judge, and others in the legal community; but no one except the victim's mother objected to or questioned ***941*** the propriety of the offer. There also is testimony that payment of money, unrelated to restitution or fines, in criminal cases is not unheard of in the legal community in which **Machin** practices. The approval or acquiescence of others and the alleged occurrence of similar unethical conduct does not absolve **Machin** of responsibility for his actions. However, we agree with the referee that these factors must be considered in mitigation because they tend to explain why **Machin** may not have fully comprehended the impropriety of the trust offer. Under the circumstances, we feel certain a ninety-day suspension is an adequate sanction

to punish **Machin's** breach of ethics, to encourage his rehabilitation, and to discourage others from engaging in similar misconduct. *The Florida **Bar** v. Pahules*, 233 So.2d 130, 132 (Fla.1970). Accordingly, Manuel A. **Machin** is suspended from the practice of law for a period of ninety days. The suspension shall be effective thirty days from the filing of this opinion, thus giving **Machin** time to close out his practice and protect the interests of his clients. **Machin** shall accept no new business from the date of this opinion. If **Machin** notifies this Court in writing that he is no longer practicing law and therefore does not need the thirty days to close out his practice, this Court will enter an order making the suspension effective immediately. Judgment is entered against Machin for costs in the amount of $2,701.39, for which sum let execution issue.
It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.
Fla.,1994.
The Florida Bar v. Machin
635 So.2d 938, 19 Fla. L. Weekly S238, 62 USLW 2706

Appendix B:

SERIOUS BODILY INJURY:

District Court of Appeal of Florida,
Fourth District.
STATE of Florida, Appellant,
v.
Jennifer **SCHREIBER**, Appellee.
No. 4D01-2892.
Jan. 22, 2003.

Defendant in prosecution for driving under the influence of alcohol (DUI) moved to suppress results of blood tests. The County Court, Seventeenth Judicial Circuit, Broward County, Fred J. Berman, J., ordered those results suppressed and certified question of great public importance. State appealed. On motion for rehearing, the District Court of Appeal, Polen, C.J., held that: (1) standard DUI instruction does not improperly instruct on implied consent presumption of impairment; (2) defendant's consent to blood test was not voluntary; and (3) police officer lacked authority to compel blood test.

Certified question answered; judgment affirmed in part, reversed in part, and remanded.

West Headnotes

[1] KeyCite Notes

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak357 k. Instructions. Most Cited Cases

Standard instruction in prosecution for driving under the influence of alcohol (DUI), which includes both the impairment theory and the unlawful blood alcohol theory, does not improperly instruct jury on a presumption of impairment based on test results obtained under implied consent law; jury can be instructed on unlawful blood alcohol theory absent proof of any impairment, provided blood test results have been introduced via the predicate established in *Robertson v. State*. West's F.S.A. §§ 316.1932-316.1934.

[2] KeyCite Notes

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak421 k. Advice or Warnings; Presence of Counsel. Most Cited Cases

Defendant's consent to blood-alcohol test was not knowing and voluntary under totality of the circumstances.

[3] KeyCite Notes

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test
48Ak419 k. Grounds or Cause; Necessity for Arrest. Most Cited Cases

Police officer lacked authority to compel defendant's blood test under statute conferring such authority when there is probable cause to believe that a person driving under influence of alcohol (DUI) has caused serious bodily injury or death, where the only injury resulting from accident in which defendant's car struck tree on median was defendant's two fractured ankles, from which she fully recovered. West's F.S.A. § 316.1933(1).

West Codenotes

Validity Called into Doubt

West's F.S.A. § 316.1934

***344** Charlie Crist, Attorney General, Tallahassee, and Richard Valuntas, Assistant ***345** Attorney General, West Palm Beach, for appellant.
Lawrence C. Roberts, Fort Lauderdale, for appellee.

ON MOTION FOR REHEARING

POLEN, C.J.
We withdraw our previously filed opinion dated November 20, 2002 and replace it with the following.

[1] The county court has certified the following question of great public importance to this court pursuant to Florida Rule of Appellate Procedure 9.160(b):
DOES THE STANDARD DUI JURY INSTRUCTION, WHICH INCLUDES BOTH THE IMPAIRMENT THEORY AND THE UNLAWFUL BLOOD ALCOHOL THEORY, HAVE THE EFFECT OF GIVING AN INSTRUCTION ON THE STATUTORY PRESUMPTIONS OF IMPAIRMENT IN SECTION 316.1934(2) [FN1], FLORIDA STATUTES (2001), SUCH THAT IT IS ERROR TO GIVE THE STANDARD DUI JURY INSTRUCTION WHERE BLOOD ALCOHOL RESULTS WERE ADMITTED VIA THE TRADITIONAL PREDICATE?
FN1. Section 316.1934(2), Florida Statutes (2001), in pertinent part, provides:

At the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal faculties, the results of any test administered in accordance with s. 316.1932 or s. 316.1933 and this section are admissible into evidence when otherwise admissible, and the amount of alcohol in the person's blood or breath at the time alleged, as shown by chemical analysis of the person's blood, or by chemical or physical test of the person's breath, gives rise to the *following presumptions:*

(c) *If there was at that time a blood-alcohol level or breath-alcohol level of 0.08 or higher, that fact is prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired.* Moreover, such person who has a blood-alcohol level or breath-alcohol level of 0.08 or higher is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood-alcohol level or breath-alcohol level. (Emphasis supplied.)

We have accepted jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(4)(A) and 9.160(d). We answer the question in the negative. Since we have accepted jurisdiction over the certified question, we also have jurisdiction to address the county court's order on a motion to suppress, the merits of which are addressed, *infra. See*Fla. R.App. P. 9.160(f)(1); 9.140(c)(1)(B).

At approximately 4:00 a.m. on January 5, 2001, Davie Police Officer Lance Seltzer responded to a one-car accident. He observed a vehicle had crashed its front-end into a tree in the median. He then spoke with two eye-witnesses who informed him the vehicle had "just driven off the road" into the tree. Seltzer then made contact with Jennifer Schreiber, who was standing by the car, and was identified as its driver. According to Seltzer, he noticed a strong odor of alcohol emanating from her face. She told him she did not know what had happened and that both her ankles were in a lot of pain. She was given medical attention at the scene, and was transported to Broward County General Hospital where she was later treated for two fractured ankles. Schreiber was not placed under arrest at this time.

Seltzer went to the hospital and made contact with Schreiber. He claimed she ***346** still smelled of alcohol as they spoke. Seltzer asked her if he could take a sample of her blood; however, he did not read her her rights under the Implied Consent Law, §§ 316.1932, 316.1933, 316.1934, Fla. Stat. (2001). *See*§ 316.1932(1)(a)(2)(c), Fla. Stat. (2001)(one capable of responding may refuse to submit to blood test, provided his or her license will be suspended for a year for such refusal, and the refusal itself is admissible as evidence in any criminal proceeding). Schreiber consented to Seltzer's request and a nurse took two blood draws. These blood draws reflected a blood alcohol content ("BAC") of 0.15 and 0.14, respectively.

Thereafter Schreiber was charged with driving "while she was under the influence of an alcoholic beverage to the extent that her normal faculties were impaired and/or with a [BAC] of 0.08 or more," in contravention of Section 316.193, Fla. Stat. (2001). Schreiber moved to suppress the results of the January 5 blood tests that had been taken at Officer Seltzer's bequest, alleging her "consent" had not been knowing and voluntary, and Seltzer had lacked the authority to seize her blood. Schreiber also moved to strike that portion of the information which provided she had operated a motor vehicle "with a[BAC] of 0.08 or more," relying on this court's original opinion in *Dodge v. State,* 26 Fla. L. Weekly D1550 (Fla. 4th DCA June 20, 2001), which had held since the Implied Consent Law was "insufficient," a jury could not be instructed on the *presumption* of impairment. *See Miles v. State [Miles II],* 775 So.2d 950 (Fla.2000)(holding FDLE procedures for handling blood samples, as delegated in the Implied Consent Law, are inadequate, and therefore the State is not entitled to the presumptions of impairment associated with the Implied Consent statutory scheme). Meanwhile, the State had filed a motion for approval of a subpoena duces tecum for Schreiber's medical records from Broward General, which was granted. Schreiber moved to suppress these medical records as well.

All pending motions came before the county court on July 17, 2001. Testimony was received from both Officer Seltzer and Schreiber regarding the circumstances surrounding the January 5 blood draws. Expressly relying on this court's June 20, 2001 opinion in *Dodge,* on which rehearing was pending, the county court granted Schreiber's motion to strike that portion of the information which provided she had driven "with a[BAC] of 0.08 or more." The court continued to rule on the two suppression motions, granting Schreiber's motion to suppress the results of the January 5 blood draws, but denying her motion to suppress the subpoenaed medical records.

Subsequent to the county court's orders entered below, this court withdrew its original opinion in *Dodge,* substituting a new opinion on rehearing. *Dodge v. State,* 805 So.2d 990 (Fla. 4th DCA 2001). Given our opinion on rehearing in *Dodge,* we answer the certified question in the negative. Florida law authorizes two alternative theories for the crime of driving under the influence: driving while one's normal faculties are "impaired" ["impairment theory"], or driving with a blood alcohol level of 0.08 or higher ["unlawful blood alcohol theory-DUBAL"]. § 316.193(1)(a),(b), Fla. Stat. (2001). As our Supreme Court noted in *Robertson v. State,* 604 So.2d 783 (Fla.1992), the second theory, DUBAL, is a strict-liability theory of DUI, since the fact of operating a motor vehicle with a BAC of [0.08] or higher constitutes the offense of DUI *even if impairment cannot be proven. Id.* at 792 n. 14 (emphasis supplied). The court further noted

there is some redundancy in the statutory DUI scheme, since *impairment* is *presumed* if ***347** the defendant's BAC is [0.08] or higher. *See*§ 316.1934(2), Fla. Stat. However, the presumption of impairment created by s. 316.1934(2) is a moot concern if the State proves beyond a reasonable doubt that the defendant operated a motor vehicle with an unlawful BAC, *i.e.,* 0.08 or higher. *Id.* Adding further confusion to this redundancy issue, in *Miles II,* our Supreme Court held the statutory presumption provided for in s. 316.1934(2) was invalid, *i.e.,* the State is not legally entitled to the presumptions of impairment associated with the Implied Consent Law. *Miles II,* 775 So.2d at 953-56. Yet, the court reaffirmed the admissibility of blood results introduced through the three-prong predicate discussed in *Robertson,* and not introduced pursuant to the Implied Consent Law. *Id.* at 955-57 (but noting blood results introduced through the *Robertson* predicate are not entitled to the Implied Consent presumptions, which are specially contingent upon compliance with the Implied Consent Law); *see Robertson,* 604 So.2d at 789 (the party seeking to introduce test results must establish: (1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment, and (3) expert testimony must be presented concerning the meaning of the test).

On rehearing in *Dodge,* we adopted the Second District's analysis in *Tyner v. State,* 805 So.2d 862 (Fla. 2d DCA 2001), holding where BAC results have been properly admitted under the *Robertson* predicate, and not vis-a-vis the Implied Consent Law, the court may instruct the jury that if it finds the defendant did in fact drive with an unlawful BAC, the defendant is guilty of the crime of DUI. *Dodge,* 805 So.2d at 994-95. As such, the standard jury instruction, which includes the alternative theories of DUI (impairment and DUBAL), does not improperly instruct the jury on the Implied Consent *presumption of impairment,* since the jury can be instructed on DUBAL (provided blood results have been introduced via the *Robertson* predicate) absent proof of any impairment. The certified question is thus answered in the negative. Consequently, that portion of the lower court's order striking that portion of the information which provides Schreiber had driven "with a BAC of 0.08 or more" is reversed as well, where the introduction of blood test results via the *Robertson* predicate has not been foreclosed.[FN2]

FN2. We note Schreiber has not challenged the lower court's denial of her motion to suppress the subpoenaed medical records, which contain blood test results, in this appeal. *See Robertson,* 604 So.2d at 789-91 (test results of blood drawn for exclusively medical purposes are outside the scope of the Implied Consent Law, and may be seized and used as evidence in DUI prosecutions). If admitted at trial, this evidence would provide alternative evidentiary support for the giving of a jury instruction encompassing the DUBAL theory of DUI. *See Baber v. State,* 775 So.2d 258, 263 (Fla.2000)(hospital records of a blood test made for medical purposes may be admitted in criminal cases pursuant to the business record exception to the hearsay rule; however, defendants must be given a full and fair opportunity to contest the trustworthiness of such records before they are submitted into evidence).

[2] [3] The lower court's order granting Schreiber's motion to suppress the January 5, 2001 test results is affirmed. We find no error in the lower court's findings Schreiber's consent was not knowing and voluntary under the totality of the circumstances. *See State v. Jerome,* 541 So.2d 756, 757 (Fla. 4th DCA 1989). Furthermore, we hold Officer Seltzer lacked authority to compel Schreiber's blood pursuant to section 316.1933(1), where the only injury resulting from the accident was Schreiber's two fractured ankles, from which she fully recovered; Seltzer had no ***348** probable cause that her operation of the motor vehicle had resulted in the "death or serious bodily injury of a human being."§ 316.1933(1), Fla. Stat. (2001); *see Galgano v. Buchanan,* 783 So.2d 302 (Fla. 4th DCA 2001)(broken leg resulting in 5% permanent impairment did not constitute "serious bodily injury" under section 316.1933(1)); *cf. Gerlitz v. State,* 725 So.2d 393 (Fla. 4th DCA 1998)(compelled blood provisions of section 316.1933(1) applicable where victim of car accident suffered a broken back). Where Officer Seltzer lacked authority to compel Schreiber's blood, and Schreiber's consent to the blood draws conducted pursuant to his request was ineffectual, the lower court acted correctly in suppressing the results of those blood draws.

AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with the foregoing opinion.

GUNTHER and GROSS, JJ., concur.
Fla.App. 4 Dist.,2003.
State v. Schreiber
835 So.2d 344, 28 Fla. L. Weekly D278

Appendix C:

Sample Sworn Motion to Reduce:

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 04-XXXX-CF-10A

THE STATE OF FLORIDA,

Plaintiff,

vs.

A.B.,

Defendant.

_____/

SWORN MOTION TO DISMISS/REDUCE RULE 3.190(c)(4)

COMES NOW the Defendant, A.B., by verified petition and by and through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), and moves this Honorable Court to dismiss/reduce the above referenced matter for the following reasons1:

> Note: We are not moving for complete dismissal of all charges. We are only moving for a reduction of the felony DUI charge to a misdemeanor level of DUI as we believe any injury the "victim" may have incurred in this case was legally not serious enough to be a

1 We are **NOT** incorporating our general statement of facts into this motion.

felony "serious bodily injury." If this motion is granted, then this Honorable Court will no longer have jurisdiction over this matter and it must be transferred to County Court. We are also moving to dismiss two possession charges but, they are both misdemeanors.

1. The Defendant has been arrested and charged with crimes by police agents within the jurisdiction of the State of Florida.

2. The Defendant presently has charges pending before the above styled court as a result of said arrest.

3. In the instant matter, the Defendant is charged in one count with DUI Serious Bodily Injury, F.S. 316.193, a 3rd Degree Felony.

4. The facts of the case are as follows:

a. The State has charged the Defendant with being in an automobile accident in Plantation, Broward County, Florida on 7/12/03.

b. The Defendant was charged in the one felony count in the information with being under the influence of drugs and/or alcohol and or/chemical substances to the extent her normal faculties were impaired ***and*** having caused serious bodily injury to Plantation Police Officer Casey Mittauer.

c. Defense counsel moves to reduce this charge to DUI with either no injury or an injury less than a serious bodily injury as contemplated in F.S. 316. 1933.(1)(b).

d. Officer Mittauer had a small fracture to a neck bone. Thankfully, the injury was minor and has healed. He is now back to work, and allowed to perform normal police duties. He spent only 8 hours in the hospital after the accident. He also suffered a minor concussion and minor bruises from being involved in this accident.

The concussion and bruises all healed shortly after the accident.

e. Officer Mittauer filed a civil suit against the Defendant and it has been settled. The Defendant, in the civil suit, via her insurance attorney was allowed to have a medical doctor perform an independent medical examination (IME) by Dr. Richard E.Strain, a MD Orthopedic Surgeon. His report is attached. That report shows that Officer Mittauer did not suffer an injury that meets the requirements of F.S. 316.1933(1)(b). That statue reads:

> (b) The term "serious bodily injury" means an injury to any person, including the driver, which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

The 4th DCA has said that... A police officer lacked authority to compel defendant's blood test under statute conferring such authority when there is probable cause to believe that a person driving under influence of alcohol (DUI) has caused serious bodily injury or death, where the only injury resulting from accident in which defendant's car struck tree on median was defendant's two fractured ankles, from which she fully recovered. *State v. Schreiber*, 835 So. 2d 344 (Fla. 4 DCA 2002).

Also, in another 4th DCA case the court said: There is no evidence that Galgano's traffic infraction fell within the ambit of section 318.19. Galgano's failure to yield the right-of-way did not result in death or cause "serious bodily injury" as defined in section 316.1933(1) [FN1]. **While Buchanan suffered a broken leg which resulted in a 5% permanent impairment, his injury did not amount to a "serious bodily injury" as defined in section 316.1933(1).**

Since the officer in the instant case had a bone fracture that completely healed and he is fully recovered, and the doctors give him a 1 or 2% impairment, his injuries are not serious enough to meet the standard found in the statute.

5. We hereby move to reduce this matter a misdemeanor as a result thereof.

6. We also move to dismiss the marijuana possession and paraphernalia possession charges as the police have sworn that they found those items and properly identified them as illegal *after* the Defendant was taken away in a fire rescue van. Also, the paraphernalia was found *outside* the Defendant's car. It is impossible to illegally possess something found on the ground near a person's car. There is no evidence of the Defendant admitting that she had dominion or control over the marijuana they found or the paraphernalia.

6. Pursuant to Fla.R.Crim.P. 3.190(c)(4), there are no material disputed facts and the undisputed facts do not establish a *prima facia* case of guilt of a felony DUI or possession charges against the Defendant.

7. The Defendant hereby swears to the allegations made as contained in the Jurat found below.

8. This Honorable Court must now dismiss all felony charges and the two possession charges against the Defendant.

WHEREFORE, the Defendant moves this Honorable Court to grant the relief requested herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the Office of the State Attorney, XXXXX, Esq. ASA by US Mail this _____ day of _____, 200_.

Respectfully submitted,

MICHAEL A. CATALANO, P.A.
Attorney for Defendant
1531 N.W. 13 Court
Miami, Florida 33125
(305) 325-9818
Fla. Bar No.: 371221

BY:
Michael A. Catalano

JURAT

PERSONALLY APPEARED BEFORE ME, A.B., the Defendant herein, who after being duly sworn, deposes and states that the Affiant has read the statements and material facts contained herein and swears that same are true and correct.

Dated: _____ x_____
A.B./Defendant

Notary Public, State of
Florida

Identification produced: Florida DL copy in file

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 04-7494-CF-10A

THE STATE OF FLORIDA,

Plaintiff,

vs.

A.B.,

Defendant.

_____/

AMENDMENT TO
SWORN MOTION TO DISMISS/REDUCE RULE 3.190(c)(4)

COMES NOW the Defendant, A.B., by verified petition and by and through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), and moves this Honorable Court to dismiss/reduce the above referenced matter for the following reasons:

1. In addition to the already filed sworn motion to dismiss we are including the attached report of Dr. Jarolem. Since we have not heard from the State, and we supplied the report to them in the past, we not formally incorporate that report into our sworn motion to dismiss.

WHEREFORE, the Defendant moves this Honorable Court to grant the relief requested herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the Office of the State Attorney, XXXX, Esq. ASA by US Mail this _____ day of _____, 200.

Respectfully submitted,

MICHAEL A. CATALANO, P.A.
Attorney for Defendant
1531 N.W. 13 Court
Miami, Florida 33125
(305) 325-9818
Fla. Bar No.: 371221

BY:
Michael A. Catalano

JURAT

PERSONALLY APPEARED BEFORE ME, A.B., the Defendant herein, who after being duly sworn, deposes and states that the Affiant has read the statements and material facts contained herein and swears that same are true and correct.

Dated: _____ x_____
A.B.Defendant

Notary Public, State of
Florida

Identification produced: Florida DL copy in file

Copy of Report of Dr. Jarolem is attached

Appendix D:

TYPICAL TIME LINE:

State v. A.B.
04-XXXX-CF 10A

Time Line:

7/12/03:	3:46 am	Accident takes place
	4:50 am	Hospital Blood drawn: .77(Serum)
	5:34 am	Nurse Draws Forensic Blood Sample at Hospital .53 (Whole Blood)
	11:00 am (approx)	Officer Mittauer released from hospital
7/15/03	Defense counsel writes to City asking for Records	
8/12/03	Fax to Off. Vandenhouten asking to *again* not alter the police car	
8/19/03	ME Report: Alcohol .05 and antidepressants, no marijuana test	
8/21/03	Defense Counsel allowed to inspect police car. Risk manager promises to not have car "spoiled."	
9/27/03	Arrest report signed and notarized	
11/4/03	State asks police to obtain medical records of the Defendant from Broward General Hospital and Plantation Fire Rescue	
11/6/03	State prepares notice of intent to subpoena medical records	
	Defense Attorney Catalano speaks with Officer Campbell and tells him that the Defendant objected to subpoena of her medical records.	
	Defense counsel faxes objection to Officer Cambpell	
11/10/03	Defense hand delivers copy of objection to SAO	
12/19/03	Tickets Mailed to Defendant	
12/22/03	Tickets accepted by Defendant	

5/3/04	State Processes case for felony filing
5/6/04	Information signed charging felony and is filed
5/27/04	Civil Complaint signed by Plaintiffs Attorney
5/27/04	Civil Suit Filed with Clerk of Circuit Court
6/3/04	Defendant taken into custody and bonds out
6/17/04	Counsel for Defendant files initial pleadings in Circuit Court
	Counsel for Defendant also files pleadings in County Court
6/25/04	Arraignment set in Circuit Court Set for trial 7/29/04
6/19/04	Service of Process on Civil Suit
6/29/04	Counsel (Catalano) files Notice of Appearance in Civil Court
7/29/04	First calendar call. Defense hands ASA letter with continuing objection to release of Defendant's medical records. Defense continuance.
	Court also issues an order mandating disclosure of where and when blood will be retested by the State.
8/10/04	National Medical Services receives forensic blood for marijuana test
8/13/04	*Hunter* hearing. No testimony. Court grants State's request and court signs order to release records to judge for in camera inspection only.
8/16/04	National Medical reports forensic blood positive for marijuana
8/23/04	State discloses blood test results from Penna.
9/7/04	State writes to judge and admits mistake in opening envelope
9/16/04	Again State writes to judge about second mistake
11/19/04	Clerk ordered to seal Defendant's medical records
1/14/05	Defense retains Dr. Goldberger to test blood at UF and asks Michael Wagner to send all existing forensic blood to UF lab
2/05	Civil Case Settled

2/10/05	Defense asks UF to test for alcohol and report
3/1/05	Dr. Goldberger (UF) reports blood .027
3/21/05	Defense asks UF to test for antidepressants as marijuana test is impossible due to small amount of blood left
4/22/04	Motions and Trial set in Criminal Matter

Appendix E:

MOTION TO SUPPRESS STATEMENTS:

IN THE COUNTY COURT OF THE
11th JUDICIAL CIRCUIT IN AND
FOR MIAMI DADE COUNTY, FLORIDA

TRAFFIC DIVISION

CASE NO:

THE STATE OF FLORIDA,

Plaintiff,

v.

MR. CLIENT,

Defendant.
_____/

MOTION TO SUPPRESS CONFESSIONS, STATEMENTS AND ADMISSIONS

COMES NOW the Defendant, MR. CLIENT, by and through undersigned counsel and pursuant Fla. R.Crim.P. 3.190 (i), moves this Court to suppress as evidence at the time of trial in the above-styled cause all written and oral statements made by the accused to the police or other state agents. We also move to suppress all statements made by the accused to any person whatsoever. We move to suppress the statements made by the Defendant about drinking, taking medicine, driving, and all other statements made by the Defendant. As grounds therefore, it is alleged that:

1. The written and oral statements were obtained from the accused in violation of the Defendant's right to counsel and the Defendant's privilege against self incrimination guaranteed by the Fifth, Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *Miranda v. Arizona,* 86 S. Ct. 1602 (1966), as well as guaranteed by F.R. Cr. P. 3.111 and Article I, Sections 9 and 16 of the Florida Constitution (1968).

2. The written and oral statements were obtained from the accused in violation of the Defendant's right to be free of unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution and by Article I, Section 12 of the Florida Constitution (1968). *Brewer v. Williams*, 97 S.Ct.1232 (1977); *Wong Sun v. United States,* 83 S. Ct. 407 (1963); *State v. Dixon*, 348 So.2d 333 (2nd DCA 1977); *Jones v. State,* 346 So.2d 639 (2nd DCA 1977); *Singleton v. State*, 224 So. 2d 378 (3rd DCA 1969); *French v. State*, 198 So. 2d 668 (3rd DCA Fla. 1967).

3. The written and oral statements obtained from the accused were not freely and voluntarily given, in violation of the Defendant's rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution (1968). The police used improper coercion to obtain statements and a breath test. The legal advice given by the police was improper.

4. The written and oral statements were obtained from the accused in violation of the Defendant's rights secured by 3.130 F.R.Cr.P.

5. The written and oral statements obtained from the defendant are not supported by an independent *prima facie* proof of the *corpus delicti* of the crime for which the defendant is charged.

6. All statements are also privileged and inadmissible under the Florida Accident Report Privilege Statute, F.S. 316.066. See also, *State v. Marshall*, 695 So. 2d 686 (Fla. 1997), and *Nelson v. DHSMV*, 757 So. 2d 1264 (Fla. 3rd DCA 2000).

WHEREFORE, the Defendant moves this Honorable Court to grant this Motion and suppress evidence as stated herein.

Certificate of Service removed to save space.

Appendix F:

TYPICAL BAD STOP/BAD ARREST MOTION:

IN THE COUNTY COURT OF THE
11th JUDICIAL CIRCUIT IN AND
FOR MIAMI DADE COUNTY, FLORIDA

CASE NO.:

THE STATE OF FLORIDA,

Plaintiff,

vs.

MR. CLIENT,

Defendant.
_____/

TRAFFIC DIVISION

MOTION TO SUPPRESS PHYSICAL EVIDENCE - BAD STOP AND NO GROUNDS TO REQUEST TESTS AND NO GROUNDS TO MAKE AN ARREST

COMES NOW the Defendant, MR. CLIENT, by and through the undersigned attorney and files this, the Motion to Suppress Physical Evidence pursuant to Rule 3.190 (h) of the Florida Rules of Criminal Procedure and moves this Honorable Court to suppress as evidence all indicia of the alleged driver's driving under the influence of alcohol. We seek to suppress evidence because there was no legal reason to make a stop, no grounds in this case to request any DUI type tests, and later no grounds to make any arrest for any criminal law violation.

As grounds for this motion, the Defendant would show that the evidence mentioned above was obtained by law enforcement officers as a result of an unreasonable search and seizure in violation of the Defendant's rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Articles I, Section 1, of the Florida Constitution, in that:

1. The evidence was illegally seized without a search warrant because:

(a) The search was beyond the scope of that permitted by incident to

lawful arrest. *Chimel v. California*, 395 U.S. 752 1969.

(b) There was no probable cause for the issuance of a search warrant for said search, if any warrant was issued.

(c) There was no probable cause or reasonable grounds to justify the search.

(d) There was sufficient opportunity to obtain a search warrant for said search if one was not obtained.

(e) The Defendant did not consent to any search or seizure.

(f) Said search/seizure was not incident to a lawful arrest and the evidence seized thereby represents the "fruit of the poisonous tree," *Wong Sun v. United States,* 371 U.S. 407,487 (1963).

(g) The connection between the illegal search and the discovery of evidence sought herein to be suppressed has not become sufficiently attenuated as

to dissipate the taint of the original lawless conduct of the police. *Nardone v. United States*, 308 U.S. 338, 341 (1939) and *Wong Sun v. United States*, 371 U.S. 407, 487 (1963).

(h) The evidence sought herein to be suppressed was obtained as a result of an illegal detainment because the police authorities did not observe sufficient circumstances to formulate a reasonable belief that a crime had been committed by the Defendant. See Florida Statute 901.151, *State v. Gustafson*, 258 So. 2d 1 (Fla. 1972) and *Bailey v. State*, 1319 So. 2d 2 (Fla. 1975) and *Brendlin v. California*, 127 S. Ct. 2400 (2007).

(i) The evidence sought herein to be suppressed was not obtained pursuant to a legal "pat down" for weapons. *Sibron v. New York*, 392 U.S. 40 (1968).

(j) The stop was a mere pretext for a warrantless search. *State v. Kehoe*, 521 So. 2d 1094 (Fla. 1988), and *State v. Clark*, 511 So. 2d 726 (Fla. 1st DCA 1987). Under *Whren v. United States*, 116 S. Ct. 1769 (1996), *Holland v. State*, 696 So. 2d 757 (Fla. 1997) and *Payne v. State*, 654 So. 2d 1252 (Fla. 2d DCA 1995), the State must prove that a person violated a specific traffic or other law before having authority to make a stop and subsequent arrest. See *Crooks v. State*, 710 So. 2d 1041(Fla. 2nd DCA 1998), and *State v. Riley*, 638 So. 2d 507 (Fla. 1994), *Frierson v. State*, 28 F.L. W. D1329 (Fla. 4th DCA June 4, 2003)

also cited at 28 Fla. L. W. D1828 (Fla. 4th DCA Aug. 6, 2003)(reh. den.) and *State v. Williams*, 10 Fla. L. W. Supp. 595 (Fla. 17th Cir. May 23, 2003, Weinstein, J).

(k) The officer had no legal grounds detain the Defendant. The officer did not see any law violation that would have given the officer legal authority to stop and detain the Defendant. The Defendant violated no law.

(l) The detaining officer had no legal authority to stop and detain the Defendant. The stopping officer did not see any infraction or accident. Under Florida Law, the officer had no legal right to stop the defendant. Any evidence derived after the stop, must be suppressed. Even when an accident is involved, the police can not use the Defendant's statements to formulate grounds to make an arrest until after *Miranda* has been given and waived, otherwise, the Florida Accident Report Privilege statute will be violated. See F.S. 316. 066, 316.062 and *State v. Marshall*, 695 So. 2d 686 (Fla. 1997) and *Nelson v. DHSMV*, 757 So. 2d 1264 (Fla. 3d DCA 2000). This also applies to statements made by people other than the Defendant.

2. There were no grounds for the officer to detain the Defendant and ask for any DUI type test and furthermore no grounds to make an arrest. See *State v. Toepfer*, 14 Fla. L. W. Supp. 297 (Fla. Broward County Court, Nov. 15, 2006, Pollack, Judge). Even if there was grounds to stop the car, the officer(s) should not have detained the Defendant any longer than was needed to write a ticket and send the Defendant on his/her way. See. *Nulph v. State*, 838 So. 2d 1244 (Fla. 2nd DCA

2003) and *Napoleon v. State*, 33 Fla. L. W. D1678 (Fla. 1st DCA June 30, 2008).

3. As further grounds for this motion, the Defendant would show the following reasons for suppression together with a general statement of facts upon which this motion is based as required by *State v. Butterfield*, 285 So. 2d 626 (Fla. 4th DCA 1973):

(a) That on July 29, 2009 the arresting officer allegedly observed the Defendant driving a car on a certain road but, not violating any laws. The officer observed no illegal activity. Thereupon the officer affected an arrest for an alleged violation of a Florida Statute.

(b) Other facts to be shown at the hearing on this motion.

4. Since the officer had no legal grounds for detaining the Defendant, all evidence from the time when the officer detained the Defendant must be suppressed or excluded.

5. Additionally, the Defendant was not under the influence of alcohol or drugs of any kind to any extent. Therefore, there was no probable or reasonable ground to cause to ask for tests or make a DUI arrest. There are no facts that would justify a police officer in asking anyone to do any DUI type tests. The Police did not have legal grounds to ask for tests so, the test results must be suppressed and without them, the State does not have any evidence of legal grounds to have arrested the Defendant for DUI. The arrest is therefore illegal. *State v. Kilphouse*, 771 So. 2d 16 (Fla. 4th DCA 2000).

6. The police had no legal good faith reason(s) for stopping, detaining, seeking any tests, asking any questions or doing anything with the Defendant. The Stop and subsequent requests/tests must all be suppressed. Thereafter, the charges should be dismissed.

7. If the State is not ready with live witnesses to disprove the allegations in this motion, then we ask that it be granted, absent very good cause. See *State v. Fortesa-Ruiz*, 559 So. 2d 1180 (Fla. 3rd DCA 1990).

8. Other grounds to be argued *ore tenus*.

WHEREFORE, the Defendant respectfully requests this Honorable Court to grant this Motion to Suppress and suppress and/or exclude evidence from the trial of this matter as discussed herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished Via Hand Delivery to the Office of the State Attorney, on this _____ day of September, 2009.

Respectfully submitted:

MICHAEL A. CATALANO, P.A.
Attorney for the Defendant
1531 N.W. 13th Court
Miami, FL 33125
(305) 325-9818
Fla. Bar No: 371221
Miami-Dade Traffic Clerk Code # 2280
mclawyer@bellsouth.net

By: _____
Michael A. Catalano, Esq.

Appendix G:

CLARK/TRAUTH MOTION ABOUT BAD IMPLIED CONSENT FORM:

IN THE COUNTY COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

TRAFFIC DIVISION

CASE NO.:

THE STATE OF FLORIDA,

Plaintiff,

vs.

MR. CLIENT,
Defendant.
_____/

MOTION TO SUPPRESS BREATH "READING" EVIDENCE

COMES NOW the Defendant, MR. CLIENT, by and through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.190, and moves this Honorable Court to exclude and/or suppress evidence of the breath, urine or blood test reading or results and all information pertaining thereto for the following reasons:

1. The Defendant has been arrested and charged with a crime by police agents within the jurisdiction of the State of Florida.

2. The Defendant presently has charges pending before the above styled court as a result of said arrest.

3. In the instant matter, the Defendant is charged with DUI, F.S. 316.193, a misdemeanor of the second degree.

4. The facts of the case are as follows:

a. On June 21, 2009, at approximately 4:48 a.m., a police officer of the Florida Highway Patrol stopped the Defendant. The police officer used his/her police powers to get the Defendant to perform physical exercises and to seek a breath/urine/blood sample. The police read an implied consent form to the Defendant to attempt to coerce the Defendant into submitting to a breath or urine or blood test. The Defendant was improperly coerced and was given material misinformation. As a result thereof, the Defendant submitted to a breath test and the results were .136/ .128.

b. The police had no reason to even suggest a "blood" test. They were using a form that was a "jack of all trades" form that really was a "master of none."

c. The police requested a breath, ***blood*** and urine test of the Defendant and the Defendant submitted after being told that the defendant's license would suspended for a minimum of 12 months if the Defendant didn't submit. (See attached implied consent forms). There was no legal reason to

demand, seek or even mention a blood test. The word "blood" should not have been mentioned at all. This was not an accident case with serious injuries or any injury to the Defendant and the Defendant had no injury that would have made a breath test impossible. The Defendant was improperly coerced into giving a breath, blood or urine sample. The police used improper promises and threats to obtain a breath, blood or urine sample from the Defendant. The police also materially misrepresented Florida Law.

Pursuant to *Trauth and Llamas v. DHSMV*, 14 Fla. L. W. Supp. 10A (Fla. 11th Cir. Oct. 17. 2006), *DHSMV v. Clark*, 32 Fla. L. W D2155 (Fla. 4th DCA Sept. 12, 2007)2, *Clark v. DHSMV*, 14 Fla. L. W Supp. 429a(Fla. 17 Cir. Ct. Dec 18, 2006), *Martin v. DHSMV*, (unpublished and attached) and *Whitehead v. DHSMV*, (also unpublished and attached)this Honorable Court must now exclude any reference to the request for breath, urine and/or blood tests and the submission and results of any such test(s). Both Mr. Trauth and Mr. Llamas were acquitted in criminal court but, had their refusal suspensions sustained at a DHSMV formal review hearing held pursuant to F.S. 322.2625. Both were consolidated on appeal and the result was the above referenced opinion that is binding on all county court judges in Miami-Dade County. At DHSMV hearings, the State's burden is a

2 This matter is now final. All motions for rehearing were denied and the matter was not appealed to the Florida Supreme Court.

simple preponderance burden. F.S. 322.2615(7). Now that the appellate court has ruled that they can not meet that burden, then, they certainly can not meet any required burden to allow the evidence to be admissible in criminal court. See also; *Burnett v. State*, 536 So. 2d 375 (Fla. 2d DCA 1988), *Chu v. State,* 521 So. 2d 330 (Fla. 4th DCA 1988), *State v. Perez,* 531 So. 2d 961 (Fla. 1988), *State v. Prues*, 478 So. 2d 1196 (Fla. 4th DCA 1985), *Slaney v. State,* 653 So. 2d 422 (Fla. 3d DCA 1995), *State v. Eve,* 4 Fla. L. W. Supp. 115 (Fla. Hillsborough County Court, Judge William Fuente, May 13, 1996) and, *State v. Waligroski,* 3 Fla. L. W. Supp. 454 (Fla. Hillsborough County Court, Judge Fuente Sept. 5, 1995). Since Slaney was handed down in 1995, the law was well settled that test evidence is not admissible if it was illegally obtained in DUI cases. See also, *State v. VcAvoy*, 13 Fla. L. W. Supp. 332 (Fla. 17the Cir. Broward County, Fla. Nov. 30, 2005)(Court correctly suppressed blood test evidence when accused was not properly informed that implied consent law only required submission to a breath and urine test).

The police then suspended the Defendant's license for many months pursuant to F.S. 322.2615. See *Wattron v. DHSMV,* 11 Fla. L. W. Supp. 1039 (Fla. 4th Cir. Sept. 9, 2004) and *Patrick v. DHSMV,* 11 Fla. L. W. Supp. 1039 (Fla. 7th Cir. July 27, 2004). Since the request was illegal, the police improperly coerced the Defendant and the breath test results and/or refusal evidence must now be suppressed or excluded.

Just as a citizen has a right to resist (without violence) and unlawful arrest, the Defendant had a right to refuse an unlawful request for a "blood" test. There were no legal grounds to seek a breath test. F.S. 316.1932, 316.1933 and 316.1934. The State can not argue that the form may list breath, urine and/or blood but, the police officer was actually only going to seek a breath sample as they made that same argument in the Trauth and Llamas matters and it was flatly rejected by the court. The court was so outraged by the position taken by the State via DHSMV that they also awarded attorneys fees to the petitioners.

5. Pursuant to Fla.R.Crim.P. 3.190, the breath test evidence must be suppressed and excluded from evidence in this matter.

6. The police agency should have used a standard form used by most police departments that never mentions a blood test. Attached are many samples of forms from many police departments in Miami-Dade County, Broward County and Monroe County. In 2002, The Florida Legislature amended F.S. 943.05 mandating that all Florida law enforcement agencies use standard forms for arrests and standard alcohol influence reports and that the forms be adopted by July 1, 2004. The police in Florida have not met that deadline.

7. Additionally, this Honorable Court must now dismiss all charges against the Defendant. If all charges are not dismissed then, the breath, urine and/or blood test evidence must be suppressed as it was obtained by illegal means

and illegal threats of a license suspension that could not be sustained. Illegal coercion should not be condoned by the courts.

WHEREFORE, the Defendant moves this Honorable Court to grant the relief requested herein.

CERTIFICATE OF SERVICE LEFT OUT TO SAVE SPACE.

Appendix H:

February 6, 2013

Valerie Hanson
Tape Custodian
Miami Beach Police Department
1100 Washington Avenue
Miami Beach, Florida 33139

RE: State v. Joe Blow
Case No.:09-kdkdkdk
Police Case No: 2010-0000000

Dear Ms. Hanson:

Pursuant to Chapter 119, Florida Statutes, please make a copy of any and all police communications tape(s), including any and all 911 calls, in any frequency that was taped in reference to the above listed matter. Mr. Blow was arrested on 08/00/2010, at 2:35 A.M. at MacArthur Causeway at Terminal Isle Enclosed please find a copy of the arrest form.

We are also requesting a copy of any and all vldeo tapes you have showing the Defendant at any place. This includes any booking photos, booking area videos etc.

I understand you will call my office when the tape is ready. When you do, please make reference to the defendant's name, and the amount of the fee due for copying the tape.

Thank you for your anticipated cooperation.

Very truly yours,

Michael A. Catalano

MAC/rl
Enclosure

Appendix I:

Brenda
Legal Department
Florida Department of Law Enforcement
P.O. BOX 1489
Tallahassee, Fl 32302-1489
(850) 410-7676 – Office
(850) 410-7699 – Facsimile

State v. Nancy Press
Case No.: 3382-XCK

Dear Brenda:

Please be advised the undersigned represents Mrs. Press in the above referenced matter. Mrs. Press was arrested and charged with DUI on February, 2, 2008 between the hours of 23:00 and 00:30, by Officer Richard Closius, ID # 030-3195, of the Miami Dade Police Department. We are requesting a TAR report on the following:

a. Whether Officer Closius ran a tag check on the Defendant's tag number X55- 7ZI and between what times it was done.

b. Whether Officer Closius ran a criminal priors check or any check whatsoever on the Defendant and between what times it was done.

If there any costs associated with this request, please let me know so, I may forward payment to you immediately. Should you have any questions, please do not hesitate to contact me.

Feel free to email this to us at: mclawyer@bellsouth.net

Very truly yours,

Michael A. Catalano

MAC/or

Appendix J:

February 6, 2013

Lafaydra Neal
Claim Adjuster
Geico
P.O. BOX 9091
Macon, Georgia 31208
(888) 496-2464 – Officer
(202) 354-5295 – Facsimile

Re: Our Client: Joe Blow
Claim Number: 03-0000000000
Date of Loss: 05/19/2009

Dear Ms. Neal:

Please be advised that I represent, Joe Ann Blow in this matter. Please have no further direct contact with her. Please direct all correspondence to me.

If you would like to take a statement of my client, please call me and I would be glad to help. Please provide me with a dec sheet that shows what coverage she had.

Before she gives any written or oral statements to the insurance company, please sign below agreeing that any statements made by my client will be attorney-client privilege and work product and will not be released to any other party unless you receive a court order and/or subpoena and give me more than adequate time to object. In other words, by me being an attorney and your company and I working together, we can use the attorney-client privilege to shield his information from any other person involved.

Please have someone with authority sign below and fax it back to me if you want any statements from my client explaining what happened. My fax number is: 305-325-8759. You can also scan and email to: mclawyer@bellsouth.net.

Please feel free to contact me if I can be of further assistance. I look forward to working with you and will send all police reports when I get them. Please only call my office after 9:00 a.m. during the week as I forward the calls to my cell phone and do not wish to speak to an adjuster before 9:00 am.

Very truly yours,

Michael A. Catalano

MAC:or

Agreed to: _____

Name:
Title:
With authority to represent and bind Geico Insurance Company

Date: _____

Appendix K:

Prosecutors won't pursue charges in '09 DUI case

Courtesy of The Miami Herald:

BY DAVID OVALLE

DOVALLE@MIAMIHERALD.COM

Prosecutors won't pursue charges against a Miami civil lawyer accused of pressuring a Homestead man to lie about where he drank the night he allegedly killed three children in a drunken driving wreck in 2009.

Ariel Furst, who represents the victims' survivors, had been under investigation for solicitation of perjury and insurance fraud.

Furst had sued criminal defendant Gabriel Delrisco -- who is awaiting trial on three counts of DUI manslaughter -- and El Paso Restaurant in Homestead.

Last year, Delrisco's lawyer claimed that Furst wanted Delrisco to lie about how long he drank at El Paso. That would make it easier to collect from the restaurant.

But, in a report released this week, prosecutors decided they didn't have enough evidence or witnesses to make a case.

``We're pleased but not surprised that Mr. Furst has been exonerated and this matter is behind us,'' said Furst's defense attorney, Milton Hirsch.

Furst and the children's survivors, the Serrano family, have since dropped the claim against El Paso, although Delrisco still faces suit.

Prosecutors say Delrisco slammed his truck into the back of the Serrano family car at a stoplight at about 5 a.m. Jan. 25, 2009. Killed were the Serrano children: Hector, 10, Esmeralda, 7, and Amber, 4.

Delrisco's blood alcohol level was three times the legal limit, prosecutors say.

Delrisco's criminal defense lawyer, Michael Catalano, says his client drank at El Paso but left some five hours before the crash. His high blood alcohol content after the crash suggests he kept drinking elsewhere.

Catalano alleged to prosecutors that Furst wanted Delrisco to say he drank at El Paso the entire night to enhance the lawsuit against the restaurant, and possibly the eatery's strip mall.

In return, the Serrano family would approve a lighter prison term for Delrisco, Catalano alleged.

Furst repeatedly claimed he had independent witnesses placing Delrisco at El Paso just before the crash.

The matter is now under review by the Florida Bar.

Furst and Catalano have filed complaints against each other.

Read more: http://www.miamiherald.com/2010/06/26/1701612/charges-dropped-against-miami.html#ixzz0ysE1qKGx

MEMBER BENEFITS

The Florida Bar • 651 East Jefferson Street • Tallahassee, Florida 32399-2300
www.floridabar.org/memberbenefits • 850/561-5600 • 800/342-8060

LEGAL RESEARCH

ABA PUBLICATIONS ***www.ababooks.org***

100's of books in a variety of formats. Rigorously reviewed to offer highest quality information & presentation.

ref. #PAB6EFLB for 15% discount

CCH ASSOCIATION
http://tax.cchgroup.com/members/tfb

Savings up to 30% off industry-leading tax and accounting books.

Use ref. #Y5604 at check out.

FASTCASE NATIONAL LAW LIBRARY
866-77-FASTCASE

Comprehensive 50 state and federal case law databases. Unlimited dual column printing. 80% discount off retail.

FREE FLORIDA CASE LAW at
www.floridabar.org.

LEXISNEXIS **866-836-8116**
www.lexis.com/flabar

Flexible research and big savings. Shepard's® and exclusive content make research easier. Unique offerings,affordably priced and easy to customize.

BANK PROGRAMS

BANK OF AMERICA **800-932-2775**
www.bankofamerica.com/floridabar

Apply Online or toll-free! Affinity credit card. CD's, Money Market, free checking: **(Code: LAAZZ).**

LAWPAY **866-376-0950**
www.affiniscape.com/floridabar

Law Firm Merchant Account. Members can save up to 25% off credit card processing fees.

INSURANCE

BUSINESS PLANNING CONCEPTS, INC.
800-282-8626 ***www.memberbenefits.com***

Medical, disability, life, hospital, AD&D, long term care, retirement programs, workers' comp., pet insurance & more.

CELEDINAS INSURANCE GROUP
www.celedinas.com/florida-bar

Offers excess personal liability coverage, up to 60% discount.

FLORIDA LAWYERS MUTUAL (FLMIC)
800-633-6458 • *www.flmic.com*

Lawyer-created liability carrier.

GEICO **800-368-2734**
www.geico.com

The GEICO Auto Insurance Program offers car insurance with 24-hour service. Bar members may qualify for additional discounts.

JURISCO **800-274-2663**
www.jurisco.com

Civil court bonds by phone in 24 hrs.

BUSINESS / SOFTWARE / SUPPLIES

PRODOC **800-759-5418**
www.prodoc.com

ProDoc legal forms software. Family, Estate Planning, Probate & more.

STAPLES **800-3STAPLE**
www.staples.com

Office supplies, furniture and technology.

SUBSCRIPTION SERVICES, INC.
800-289-6247 • *www.buymags.com*

TABS3 TRUST ACCOUNTING SOFTWARE
www.tabs3.com/floridabar

Members of the Florida Bar are entitled to exclusive pricing for Tabs3 Trust Accounting Software (handles up to 5 billable timekeepers). The member benefit price is $99 – over a 40% savings!

APPAREL / HOME / GIFTS

ANN TAYLOR
www.floridabar.org/memberbenefits

Chic, smart and sophisticated. 20% off $100 or more. Certificate must be presented at time of purchase.

THE BILLABLE HOUR COMPANY
www.thebillablehour.com/flabar.php

Wide selection of gifts for lawyers and legal professionals. Save 10% with code: **FLABAR.**

BROOKS BROTHERS **866-515-4747**
membership.brooksbrothers.com

Enroll for your **Corporate Membership Card** and **Save 15%** on regular and everyday value priced merchandise. Enter your Organization ID #**10320** and your Pin Code #**97352**.

JOS. A. BANK CLOTHIERS **800-285-2265**
www.josbank.com **• Code: 91861**

Specializing in men's clothing Save 20% with the JoS. A. Bank Corporate Discount Card. (Sale items excluded). Call for FREE Corporate Card.

SEARS COMMERCIAL
www.floridabar.org/memberbenefits

Save 5-50%* off everyday items! Florida Bar members can point, click and save money on items to furnish and finish their homes.To enroll, email *SearsBenefit@FloridaBarBenefits.org* with your first and last name and home address today!

**Discount reflects savings off regular price. Program is not available in Sears retail stores.*

MAILING & DELIVERIES

FEDEX **800-636-2377**
www.1800members.com/flb

Save up to 26% on Fed Ex shipping services.

UPS **800-325-7000**
www.savewithups.com/floridabar

Discounts on services.

AUTOMOBILE RENTALS

ALAMO ***www.alamo.com*** **• 800-354-2322**

Year round discounts from Alamo!

ref. #93718

AVIS ***www.avis.com*** **• 800-331-1212**

Avis Preferred Renter fees waived.

ref. #A421600

BUDGET ***www.budget.com*** **• 800-527-0700**

Year round discounts from Budget.

ref. # Y067600

HERTZ **www.hertz.com • 800-654-2200**

Hertz #1 Club Gold fees waived.

ref. #152030

NATIONAL **www.nationalcar.com**
800-227-7368

National Emerald Club fees waived.

ref. #5650262

MEDICAL EVACUATION AND REPATRIATION

MEDJET **800-527-7478**
www.Medjet.com/TFB

Enroll prior to travel with Medjet rates reduced up to 18% for domestic & international "hospital of choice" protection, personal & business travel. Reference The Florida Bar.

For information on ALL Bar Membership Services, visit www.floridabar.org/memberbenefits

REV 09/11