

>> ALL RISE.

SUPREME COURT OF FLORIDA IS  
NOW IN SESSION, PLEASE BE  
SEATED.

WE NOW GO TO THE THIRD CASE  
ON OUR DOCKET, BERNE VERSES  
THE DEPARTMENT OF HIGHWAY  
SAFETY AND MOTOR VEHICLES.

>> MAY IT PLEASE THE COURT,  
I'M STEWART HYMAN, THE  
REASON HEAR HERE TODAY.

THE CHARGE THAT HE WAS  
DRIVING UNDER THE INFLUENCE  
OF ALCOHOL WAS APPEALED AND  
THE THIRD DISTRICT COURT OF  
APPEAL DISAGREED WITH THE  
OPTION.

>> LET ME ASK YOU A  
QUESTION, IF I AM ARRESTED  
FOR A DUI, AND I'M ARRESTED  
FOR A DUI, AND MY READING IS  
A 08%, DOES THAT  
AUTOMATICALLY SUSPEND MY  
LICENSE?

>> YES >> WHAT IF IT'S 07%?

>> NO.

>> SO THIS SMALL DIFFERENCE  
DETERMINES WHETHER OR NOT I  
HAVE A LICENSE FOR 6 MONTHS  
BEFORE I AM CONVICTED OF  
THIS CRIME?

>> YES, AND IT CAN BE AS  
MUCH AS 12 MONTHS DEPENDING  
ON PRIORS.

>> THE REASON WE HAVE THESE  
TESTS IS BECAUSE IT MAKES  
THAT SPLIT DIFFERENT,  
CORRECT?

>> I AGREE.

>> THE PERSON WHO CONDUCTED  
THE TEST IS THE PERSON HIRED  
BY FDLE TO DO THESE TESTS --

>> THE PERSON WHO ACTUALLY  
DID THE TEST IS EMPLOYED BY  
A SHERIFF'S DEPARTMENT.

>> FOR ORANGE COUNTY.

>> RIGHT.

>> BUT THE PERSON FROM FDLE  
WHO TESTIFIED IN THIS CASE,  
SKIPPER IS THE NAME?

>> MR. SKIPPER AND HE IS A  
DEPARTMENT INSPECTOR WITH  
THE FLORIDA DEPARTMENT OF  
LAW ENFORCEMENT.

>> SO HE IS THE PERSON WHO  
IS IN CHARGE OF LOOKING INTO  
THE MACHINES AND TESTING  
THEM TO MAKE SURE THEY'RE  
ACCURATELY READING, CORRECT?

>> TO A CERTAIN DEGREE, YES,  
HE IS ON THE LOW PART OF THE  
TOTEM POLE.

THERE IS AN INDIVIDUAL AHEAD  
OF THE ALCOHOL TESTING  
PROGRAM, AND THERE ARE  
VARIOUS DEPARTMENT  
INSPECTORS THAT YOU'D GO  
AROUND THE STATE AND INSPECT  
THE DEVICES ON AN ANNUAL  
BASIS AND ALSO TO REGISTER  
THE MACHINES FOR USE AS A  
DEVICE IN THE STATE OF  
FLORIDA, THEY WOULD GO TO  
EACH INDIVIDUAL AGENCY AND  
GO DO THAT.

>> I GUESS MY POINT IS THAT  
HE WAS NOT A HIRED EXPERT,  
HE WAS SOMEBODY THAT WORKED  
IN THE AGENCY AND WAS IN  
CHARGE OF TESTING THESE  
MACHINES.

>> RIGHT.

>> AND HE FOUND THE MODEL  
USED ON YOUR CLIENT HAS SOME  
PROBLEMS WITH THE SOFTWARE,  
AT THE TIME, BEFORE AND  
AFTER.

>> BEFORE AND AFTER.

>> THANK YOU.

>> WHAT I WANT TO --

>> IT SEEMS THAT THE REAL  
HOLDING THAT WE'RE GOING TO  
HAVE TO DEAL WITH, THE 5TH  
DISTRICT HELD THAT YOU ONLY  
NEED TO HAVE AN EVALUATION,  
I GUESS, OF THE SOFTWARE,  
NOT NECESSARILY OF APPROVAL  
BECAUSE THE 8,000 MILLION,  
ITSELF, WAS APPROVED, IT'S  
THE SOFTWARE, AND EACH TIME

THEY CHANGE THE SOFTWARE  
SOMEBODY EVALUATES, THIS WAS  
IN JANUARY OF 06 BEFORE YOUR  
JULY OF 06.

IT WAS EVALUATED, AND THAT'S  
IT.

SO ISN'T THAT REALLY THE  
LEGAL ISSUE THAT WE'RE  
DEALING WITH?

>> THAT'S WHERE I WAS GOING  
WITH IT.

I THINK THAT WHEN WE GET TO  
THE CONSTRUCTION --

CRUX OR --

OF THIS IS IF THE 5TH  
DISTRICT COURT OF APPEAL HAD  
THE ABILITY TO DO THIS  
DECISION IN THE FORM OF AN  
OPINION AND HAVING DONE SO

IF THAT OPINION IS TO  
ESTABLISH LAW WITH THE  
EVALUATION AND APPROVAL.

>> NOW LET'S SEE IF I  
UNDERSTAND, I THOUGHTS --  
THOUGHT THAT YOUR COMPLAINT

TO THE CIRCUIT COURT, THAT  
THE CIRCUIT COURT AGREED  
WITH YOU, IS THAT WHEN YOU  
CHANGE THE SOFTWARE, EACH  
TIME, IT REQUIRES A  
APPROVAL, NOT AN EVALUATION,  
IS THAT YOUR LEGAL --  
THAT'S YOUR LEGAL ARGUMENT?

THE 5TH DISTRICT SAID THAT  
NO, EVALUATION NOT A  
APPROVAL IS WHAT IN PLAIN  
LANGUAGE REQUIRES, IS THAT  
CORRECT?

>> I AGREE THAT'S THEIR  
POSITION.

>> SO THE RULE --  
THE ISSUE IS IF OBVIOUSLY IF  
WE AGREE WITH THE CIRCUIT  
COURT THAT THE PLAIN  
LANGUAGE REQUIRES APPROVAL  
EACH TIME THERE IS A CHANGE  
IN THE SOFTWARE, THIS WHOLE  
THING --  
OBVIOUSLY THE 5TH DISTRICT  
GETS IT WRONG.

MY CONCERN IS AS FAR AS THE  
PRINCIPAL HERE, IS THAT IF  
THE PLAIN LANGUAGE APPEARS  
TO SAY NO, YOU DON'T NEED TO  
HAVE APPROVAL EACH TIME  
THERE IS A SOFTWARE CHANGE,  
JUST AN EVALUATION, THEN THE  
CIRCUIT COURT WAS JUST, ON  
THE PLAIN LANGUAGE, WRONG.  
AND IS THAT, I MEAN, THAT  
LEGAL ISSUE, I WOULD LIKE TO  
DISCUSS THAT SEPARATE FROM  
WHAT JUSTICE LABARGA IS  
BRINGING UP, IT LOOKS LIKE  
THERE'S LOTS OF ERRORS IN  
THIS PARTICULAR ISSUE WHICH  
IS WHAT THE THIRD DISTRICT  
CASE DEALT WITH.  
SO IF YOU COULD SEPARATE OUT  
THE LEGAL ISSUE AS TO --  
YOU SEEM TO HAVE MADE IN THE  
CIRCUIT COURT AND AGAIN MAKE  
HERE, THAT THEY HAVE TO  
APPROVE IT EACH TIME THEY  
CHANGE THE SOFTWARE, IS THAT

YOUR ARGUMENT?

>> THAT'S THE ARGUMENT

THAT'S VERY DEER TO MY  
HEART.

.

>> SO THAT'S THE GUEST OF

YOUR ARGUMENT.

SO IF WE DISAGREE WITH YOU,  
AND SAY WE'RE READING THIS  
PLAIN LANGUAGE, AND THIS  
PLAIN LANGUAGE DOES NOT  
REQUIRE APPROVAL, DO YOU  
STILL SAY THAT THE EVIDENCE  
THAT YOU PRESENTED TO THE  
HEARING OFFICER, BECAUSE  
IT'S REALLY ALL OF CIRCUIT  
COURT DOES THEY CAN'T  
REWEIGH THE EVIDENCE, WAS  
ENOUGH EVIDENCE TO SHOW THAT  
THIS WAS AN UNRELIABLE  
BREATHALYZER BASED ON WHAT  
JUSTICE LAGARGA WAS SAYING,  
THIS IS YOUR LAND, SO I  
GUESS IT WOULD LOOK LIKE  
WOW, THAT'S A LOT OF ERRORS,

IS THAT A SEPARATE BASIS FOR  
WHICH YOU ASK THE CIRCUIT  
COURT TO LOOK AT IT, AND  
THEN IS THAT REALLY, NOT A  
REWEIGHING OF THE EVIDENCE  
AT THAT POINT.

IT'S REALLY TWOFOLD.

YOU HAVE THE LEGAL ISSUE,  
AND WE CAN DISCUSS SOME MORE  
WHETHER YOU'RE CORRECT  
LEGALLY, BUT WE ALSO HAVE  
THE FACTUAL ISSUE THAT THE  
HEARING OFFICER WAS ASKED TO  
LOOK AT, WHICH IS ARE THESE  
MACHINES, ARE THE MACHINES  
THAT WAS USED FOR HIM OUT OF  
COMPLIANCE WITH THE  
STANDARDS WHICH IS WHAT THE  
THIRD DISTRICT COURT HAD TO  
DO WITH IT.

>> I THINK IT'S A COME BIB

--

COMBINATION OF BOTH.

BUT I THINK THAT THE COURT  
IS CORRECT, AND JUSTICE

PARENTE, YOU'RE CORRECT,  
THAT THE ISSUE HERE STARTING  
OUT IS WHAT IS REQUIRED TO  
BE ABLE TO USE ONE OF THESE  
BREATH TESTING MACHINES IN  
THE STATE OF FLORIDA.  
IF YOU LOOK AT THE HISTORY  
OF THE STATUTE, AND YOU LOOK  
AT THE HISTORY OF THE RULES  
AS THEY HAVE BEEN  
PROMULGATED OVER THE YEARS,  
IT'S STATUTE WITH THE STATE  
OF FLORIDA THAT A DRIVER HAS  
AGREED TO TAKE ONLY AN  
APPROVED BREATH TEST.  
IF YOU LOOK AT THE ENABLING  
LANGUAGE IN THE STATUTE, IT  
REQUIRES THAT FDLE, OR  
ORIGINALLY HRS, NOW FDLE,  
WAS REQUIRED TO EITHER  
APPROVE OR DISAPPROVE BREATH  
TESTING DEVICES AND  
ACCOMPANYING PARAPHERNALIA.  
I THINK THAT'S IMPORTANT  
BECAUSE AS WE CITED FOR SOME

CASES IN OUR BRIEFS, AN  
ADMINISTRATIVE AGENCY  
DOESN'T HAVE AUTHORITY TO GO  
OUTSIDE OF WHAT STATUTORILY  
THEY ARE GIVEN POWER TO DO.  
AND THEY, FDLE, WAS ONLY  
GIVEN POWER BY THE STATUTE  
TO MAKE RULES FOR THE  
APPROVAL OF BREATH TESTING  
MACHINES, NOT JUST THE  
EVALUATION OF BREATH TESTING  
MACHINES.  
AND OUR POSITION IS THAT THE  
RULE, AS IT'S CURRENTLY  
WRITTEN, BECAUSE THE TWO  
PRIOR VERSIONS OF THE RULE  
REQUIRE APPROVAL OF THE  
MACHINE AND THE SOFTWARE.  
IN 2004, THEY SORT OF  
CHANGED THE LANGUAGE AROUND  
A LITTLE BIT, BUT IT DIDN'T  
CHANGE THE MEANING, AND I  
KNOW THE 5TH DISTRICT COURT  
OF APPEAL EASED ON THE WORD  
EVALUATION IN THE RULE.

BUT IF YOU READ THE ENTIRE  
RULE, I BELIEVE IT WAS TAKEN  
OUT OF CONTEXT BECAUSE IF  
YOU GO DOWN TO SUBSECTION  
FIVE, SUBSECTION FIVE OF  
THAT VERY SAME RULE, SAYS  
THAT THE FDLE WHEN IT COMES  
TO NEW INSTRUMENTATION,  
SHALL EVALUATE FOR APPROVAL

--

>> CAN I ASK A QUESTION ON  
THE CONFLICT ISSUE?  
WOULD GB DEAL WITH THIS SAME  
INTERPRETATION OF THE RULE?  
IN OTHER WORDS, DID ANY  
OTHER DISTRICT COURT TALK  
ABOUT IF A SOFTWARE IS  
EVALUATION --

>> WHAT GB WAS INVOLVED WITH  
WAS VARIOUS MALFUNCTIONS  
WITH THE MACHINE, AND THEY  
WERE FINDING THAT IT WAS NOT  
COMPLAINING WITH THE FDLE RULES  
FOR THE INVESTIGATION.

>> ON ON THE INTERPRETATION

OF IF APPROVAL OR  
EVALUATIONS WERE REQUIRED,  
WHICH CASE IS THE 5TH  
DISTRICT CASE IN CONFLICT  
WITH?  
>> IT'S IN CONFLICT WITH  
THIS COURT'S PRECEDENCE  
BECAUSE THE 5TH DISTRICT  
COURT OF APPEAL WAS CREATING  
PRECEDENT --  
>> I'M NOT --  
WE'LL GO TO THE CERT ISSUE,  
I'M ASKING ON THE RULE OF  
LAW WHICH IS A PRETTY  
IMPORTANT ISSUE, WHETHER THE  
FDLE HAS TO EITHER, YOU  
KNOW, BECAUSE IF THE CIRCUIT  
COURT IS CORRECT, THAT  
CHANGES STATEWIDE, ALMOST,  
WHAT IS HOW THE PROCESS  
GOES, AND IF THE 5TH  
DISTRICT IS CORRECT --  
WHAT I ASK ON THAT ISSUE, IS  
THERE IS NO OTHER CONFLICT.  
>> FOR THE DISTRICT COURT OF

APPEALS, THERE IS THE CASE

FROM THE FIRST DISTRICT

COURT OF APPEAL.

WHILE THAT DID NOT INVOLVE

AN 8,000 MACHINE, THAT

INVOLVED A MODIFICATION THAT

WAS MADE TO, BACK THEM AN

INTOXSIMITER3,000.

AND THEY FOUND ONCE THAT

MODIFICATION WAS MADE TO THE

MACHINE, THE MACHINE WAS

REQUIRED TO BE APPROVED.

>> APPROVED AGAIN?

>> YES, AND IN FACT, IN THAT

DECISION, IRONICALLY, THEY

CITED STATE VS. FLOOD THAT

SAID THE SAME THING.

SO MY POSITION WAS THAT IT

WAS SURPRISING THAT THE 5TH

DISTRICT COURT OF APPEAL DID

NOT AGREE WITH THE DECISION

AND THE DECISION IN THAT

REGARD, BECAUSE REALLY WHAT

THIS COMES DOWN TO, IS YOU

HAVE A MACHINE, IT'S A

MOCKS, AND IN THE BOX YOU  
HAVE A NUMBER OF MICE THAT  
ARE RESPONSIBLE FOR  
DETERMINING WHAT THE LEVEL  
OF ALCOHOL IS.  
AND SOMEWHERE DOWN THE LINE,  
YOU CHANGE IT FROM MICE  
TOGER --  
GERBILS, AND THE QUESTION IS  
CAN THEY DO THE JOB LIKE THE  
MICE DID.  
AND THE REASON WHY THERE IS  
AN APPROVAL REQUIREMENT, IS  
TO MAKE SURE THAT WHEN YOU  
REVISE THE SOFTWARE, SOME 16  
VERSIONS, THAT WHEN YOU'RE  
DOWN TO THE ULTIMATE  
VERSION, AND YOU'RE UP TO  
WINDOWS WHATEVER IT IS AT  
THIS POINT IN TIME, THAT THE  
JOB CAN STILL BE DONE AS  
WELL AS IT HAD BEEN  
PREVIOUSLY DONE.  
>> YOUR ARGUMENT MAKES TOTAL  
LOGICAL COMMON SENSE, BUT

THE COURT WAS CAUGHT UP ON  
THAT WORD, WAS IT NOT, THE  
EVALUATION.

>> YES THEY WERE.

>> SO WHAT DO WE DO WITH  
THAT?

WE WOULD HAVE TO SAY THAT  
THAT'S BEYOND THE STATUTORY  
GRANT OF AUTHORITY, IS THAT  
THE ONLY RESPONSE TO IT?  
WHAT OVER INTERRUPTION --

>> --

INTERPRETATION.

>> FIRST OFF, THE PRECEDENT  
SEEMS TO BE THAT IF A RULE  
CONFLICTS WITH A STATUTE ON  
A PARTICULAR POINT, THE  
STATUTE PREVAILS.

THE STATUTE SAYS APPROVAL.

NOWHERE READING THAT STATUTE  
ANYWHERE DOES IT SAY  
EVALUATION.

NOWHERE.

EVALUATION CAME UP IN THE  
RULE.

AND WHEN IT DID COME UP IN  
THE RULE, ONE CAN SAY IT  
MIGHT BE AN INVALID EXERCISE  
OF DELEGATED AUTHORITY, AND  
THAT THE TERM OF EVALUATION  
AS IT'S BEING USED WAS TAKEN  
OUT OF CONTEXT --

>> CAN YOU GO BACK TO THE  
ISSUE OF APPROVAL --

THE RULE CONFLICTS WITH THE  
STATUTE, WAS THAT --

I AM GOING TO NEED TO FIND  
YOUR PETITION TO THE CIRCUIT  
COURT.

IS THAT WHAT YOU'VE ARGUED  
THAT IT WAS IN CONFLICT THAT  
THE RULE WAS IN CONFLICT  
WITH THE STATUTE.

>> WE DID BECAUSE IF YOU  
LOOK AT THE CIRCUIT COURT  
OPINION, THE CIRCUIT COURT  
OPINION SPECIFICALLY FOUND  
THAT, THEY SPECIFICALLY  
FOUND THAT THE STATUTE, THE  
IMPLIED CONSENT LAW REQUIRED

APPROVAL, AND THE RESPONDENT  
REQUIRED THIS HAS TO BE  
EVALUATED UNDER THE RULE,  
BUT THE STATUTE SAYS  
APPROVAL, AND WHEN YOU HAVE  
NEW INSTRUMENTATION, IT  
REQUIRES APPROVAL.  
AND SO THAT ISSUE IS  
ACTUALLY RAISED IN THE  
CIRCUIT COURT OPINION, AND  
THE CIRCUIT COURT RULES ON  
THAT AND FOUND THAT APPROVAL  
WAS THE REQUIREMENT AND NOT  
JUST EVALUATION.  
AND GOING BACK TO JUSTICE  
LEWIS' QUESTION, WHEN I SAY  
IT'S TAKEN OUT OF CONTEXT,  
IN PARAGRAPH TWO OF THAT  
RULE, IT TAKES ABOUT  
SOFTWARE BEING EVALUATED.  
IF YOU COME DOWN TO  
SUBSECTION FIVE, SUBSECTION  
FIVE SPECIFICALLY SAYS THAT  
THE DEPARTMENT SHALL  
EVALUATE NEW INSTRUMENTATION

AND IT'S --

IT WAS LEFT OUT OF THE 5TH

STRICT COURT OF APPEAL

DECISION FOR APPROVAL.

THE WORD APPROVAL IS IN

SUBSECTION FIVE.

>> WHEN YOU USE THE WORD

INSTRUMENTATION, BUZZ THAT

REFER TO THE HARD THING?

OR DOES THAT REFER TO THE

HARD THING AND THE --

I ASSUME THIS THING DOESN'T

WORK WITHOUT SOFTWARE.

>> THAT'S MY ARGUMENT, I

DON'T KNOW HOW YOU CAN

SEPARATE THE TWO OUT, IT'S

LIKE SOMEBODY'S COMPUTER, IF

IT DOESN'T HAVE SOFTWARE,

IT'S NOT GOING TO WORK.

BUT THE OTHER ISSUE IN THAT,

THOUGH, IS I THINK EVEN IF

YOU WANTED TO LOOK AT IT

WERE THERE TWO SEPARATE

ENTITIES SO TO SPEAK, I

THINK IF YOU LOOK AT

316.1932, IT'S 12G WHERE IT  
SAYS THEY'RE AUTHORIZED TO  
APPROVE AND DISPROVE BREATH  
TESTING MACHINES AND  
ACCOMPANYING PARENT, --  
PARAPHERNALIA, AND THAT  
STATUTE REQUIRES THAT TO BE  
APPROVED.

>> EXPLAIN, AGAIN, WHERE  
EVALUATION CAME FROM.

>> IT CAME FROM THE RULE.

BUT HOW IT GOT TO THE RULE,

I, YOU KNOW, MY POSITION IS

THAT IT SHOULD NOT BE IN THE

RULE, IT SHOULD SAY APPROVAL

JUST LIKE THE THE TWO PRIOR

VERSIONS SAID APPROVAL.

BUT SOMEHOW THE LANGUAGE GOT

CHANGED AROUND, AND IT

USEDED TO BE AN

INTOXILIZIER, AND THEY HAD

TO MAKE CHANGES --

>> HOW DID IT GET --

>> I ASSUME IT CHANGED AND

THE FLORIDA DEPARTMENT OF

LAW ENFORCEMENT CHOSE THAT LANGUAGE AND THEN IT WAS IN THE RULE.

>> I WOULD ASSUME THAT THE ISSUE, AS YOU GO BACK TO THIS, IF WE GET A UPDATED VERSION OF MICROSOFT, IS THAT A CHANGE IN THE MACHINE OR JUST AN UPDATE IN THE SOFTWARE, AND IT FEELS LIKE THIS IS BEYOND -- IN TERMS OF WHERE THIS SHOULD BE CHALLENGED, IT SHOULD HAVE BEEN CHALLENGED THROUGH THE ADMINISTRATIVE PROCEDURE ACT AND GONE UP THAT WAY, WE'RE IN A NETHERLAND HERE.

THERE ARE A LOT OF CASES ON THIS INTOXILIZER, >> IT IS, AND THE PROBLEM IS, I THINK IT WAS ADDRESSED BIT 5TH DISTRICT COURT OF APPEAL IN THE RIZNER CASE WHERE THEY SAID SHOULDN'T THESE CHANGES

BE MADE.

THIS LAW OF ADMINISTRATIVE  
SUSPENSIONS IS ALSO  
INTERTWINED WITH 316.1932  
ALSO INTERTWINED WITH THE  
CRIMINAL VIOLATIONS AND THE  
PROBLEM IS IF A DEFENDANT IS  
CHARGED IN A CRIMINAL CASE  
AND THEIR SEEKING TO  
INTRODUCE A BREATH TEST, IT  
WOULD BE A LONG HAUL TO GO  
THROUGH WITH SPEEDY TRIAL  
RIGHTS AND SO FORTH, SO IT  
DETERMINES THAT THE PROPER  
VENUE, OR A PROPER VENUE TO  
MAKE THE CHALLENGE, WAS IN  
THE COURT LEVEL WHEN THE  
EVIDENCE WAS SUGGEST TO BE  
INTRODUCED.

>> THAT'S FINE IN A CASE  
WHERE IT'S A DUI CASE AND  
THAT'S THE ORIGINAL CASE.  
THE PROBLEM HERE IS THE ODD  
SITUATION WHERE THE  
DEPARTMENT OF MOTOR VEHICLES

DECIDES SOMETHING AND IT  
GOES TO THE CIRCUIT COURT IN  
AN APPELLANT CAPACITY, AND  
THEY'RE MAKING A DECISION  
THAT IS NOT PUBLISHED, AND  
IT SEEMS TO BE A BIGGY BIG  
ISSUE.

>> I THINK THEY HAVE TO BE  
READ IN MATERIAL WITH ONE  
ANOTHER.

THE FORUMS MAY BE DIFFERENT,  
BUT THE INITIAL NECESSITY TO  
HAVE A BREATH TEST IS THE  
SAME AS THE REFORM THAT  
YOU'RE IN.

IF WE WERE TO FIGHT IT  
THROUGH THE ADMINISTRATIVE  
PROCEDURE ACT, WHAT WOULD WE  
DO IN THE CRIMINAL FORUM.

AT SOME POINT IN TIME, THIS  
HAS TO COME TO A HEAD, I  
GUESS THIS IS WHERE IT'S  
COMING TO A HEAD.

>> YOU'RE DOWN TO LESS THAN  
A MINUTE OF YOUR TOTAL TIME.

>> YES, >> YOU CAN KEEP  
GOING AND USE IT ALL UP.  
>> I DON'T WANT TO USE IT  
ALL UP, I WOULD LIKE TO  
RESERVE WHAT I RESERVE, AND  
I APPRECIATE IT, THANK YOU.

>> GOOD MORNING, MAY IT  
PLEASE THE COURT, JASON  
HELFANT.

FOR THE PETITIONS  
ASSERTIONS, THERE IS NO  
CONFLICT WITH THE 5TH  
DISTRICT COURT'S OPINION,  
ANY OTHER DISTRICT COURT,  
AND THIS COURT REQUESTING  
APPROVAL --

>> THE QUESTION ON CONFLICT  
IF THE 5TH DCA APPROPRIATELY  
ENTERED INTO THROUGH THE  
FURAY BECAUSE A LONG LINE OF  
CASES SAYING YOU DISAGREE,  
AND YOU DISAGREE WITH A  
LOWER COURT SITTING IN  
CAPACITY IS INSUFFICIENT FOR  
SECOND TIER --

I UNDERSTAND IT MAY NOT BE  
ONE ON 8,000 ON THIS  
MACHINE.

THAT'S THE CONFLICT, IF IT  
EXISTS, IN THIS CASE.

AND SO THAT'S WHAT YOU NEED  
TO ADDRESS, NOT WHETHER  
THERE IS ANOTHER 8,000.

SO WHAT YOU'RE SAYING, IS  
THAT THE 5TH DCA HAD NO  
OTHER AUTHORITY OF ANY KIND  
GOING ONE WAY OR ANOTHER,  
WITH REGARD TO THE LEGAL  
PRINCIPAL IN THIS CASE.

>> NO, YOUR HONOR, IN FACT  
THE 5TH DISTRICT COURT HAD  
AMPLE AUTHORITY REGARDING TO  
THE BURDEN OF A DRIVER AT  
OUR HEARINGS, THE  
ADMINISTRATIVE HEARINGS TO  
CHALLENGE THE BREATH RESULTS  
OF THE NIGHT OF THEIR ARREST  
WELL AS TO THE DISTRICT  
COURT AND SECOND COURT.  
THE CASES ALL SAY THAT THE

PRESUMPTION THAT THE --  
INTOXIZER, IT'S A RESULT  
THAT IT IS ACCURATE --  
>> IT STARTS OUT WITH THIS  
HAS TO BE AN APPROVED TEST.  
>> YES, YOUR HONOR.  
>> THERE IS NO IMPLIED  
CONSENT TO A TEST THAT IS  
NOT APPROVED.  
BUT THE ISSUE AS I SEE IT'S  
BEING RAISED, AND I AGREE WE  
HAVE TO LOOK AT THE  
JURISDICTIONAL --  
IF THERE IS CONFLICT, THE  
LEGAL ISSUE IS HE IS SAYING  
THAT THE APPROVAL OF THE  
TEST NEVER OCCURRED BECAUSE  
THE APPROVAL IS NOT ON THE  
THE MACHINE, BUT IT'S THE  
SOFTWARE, IS IT PLAIN THAT  
IT DOES OR DOES NOT INCLUDE  
CHANGES IN SOFTWARE.  
LET'S JUST LOOK AT THE LEGAL  
ISSUE.  
WHAT DO WE USE TO DECIDE IF

SOFTWARE CHANGES REQUIRE  
APPROVAL BY THE FDLE.  
>> IN THE LANGUAGE OF 11D,  
WHICH THE COURT RELIED ON,  
WHICH SAYS ONCE THIS  
INSTRUMENT WAS APPROVALLED,  
IN THIS CASE BACK IN 2003,  
WITH THE INCORPORATION OF  
11D8003 IT'S AN APPROVED  
INSTRUMENT.  
>> WHAT ABOUT THE ARGUMENT  
THAT A SOMEONE WITHOUT  
SOFTWARE, WHEN THEY WERE  
APPROVING IT, THEY WERE  
APPROVING IT WITH A  
PARTICULAR TYPE OF SOFTWARE,  
AND EACH CHANGE COULD OR  
COULD NOT BE MATERIAL SO  
THAT EACH CHANGE OF SOFTWARE  
NEEDS TO GO THROUGH THE SAME  
APPROVAL PROCESS.  
IN OTHER WORDS, WHAT HE IS  
SAYING, IS THAT THE RULE,  
WHICH REQUIRED ONLY  
EVALUATION, IS IN CONFLICT

WITH THE STATUTE, ISN'T THAT

WHAT HE'S SAYING?

>> THAT'S WHAT HE'S SAYING,

BUT THERE IS NO CONFLICT.

>> NO CONFLICT IN WHAT?

>> IN APPROVAL, ONCE IT'S

APPROVALLED --

>> ISN'T IT A CONSTRUCTION

OF WHETHER AN APPROVED TEST

IS JUST THE BOX OR WHAT'S ED

IN THE BOX, SUSPECT THAT THE

LEGAL ISSUE?

>> I THINK 11D CLARIFIES

THAT AND SAYS WHEN THERE IS

NEW SOFTWARE THAT'S

INCORPORATED INTO THIS

INSTRUMENT, THAT REQUIRES AN

EVALUATION --

>> THAT'S UNDER THE RULE?

>> UNDER THE RULE.

>> OKAY, BUT HIS ARGUMENT AS

I UNDERSTAND IT, IS THAT THE

STATUTE REQUIRES APPROVAL,

NOT EVALUATION.

THERE'S NO WORD EVALUATION

IN ANY STATUTE, AND THIS  
RULE AND ANY OF THEM THAT  
TALK ABOUT EVALUATION AS I  
UNDERSTAND IT, ARE INVALID,  
IT MOST BE APPROVAL AND YOU  
SAY NO, WHY?

>> IT SAYS THERE IS  
NECESSITY OF AN APPROVAL OF  
THE INTOX8,000.

>> THAT DEPENDS ON IF YOU  
INTERPRET THAT AS THE  
SOFTWARE AT THAT TIME OR  
THAT PIECE OF EQUIPMENT.  
YOU COULD HAVE IT FOR 50  
YEARS AND CHANGE THE  
SOFTWARE EVERY YEAR.

I UNDERSTAND AND I SEE THAT  
IN THE RULE, BUT WHAT IS  
YOUR ARGUMENT FOR WHY THE  
STATUTE WHEN IT SAYS  
APPROVAL DOES NOT MEAN THE  
BOX, THE THING, THE HARD  
THING, PLUS WHAT MAKES THE  
HARD THING WORK, IT'S GUTS?

>> YOUR HONOR, I THINK THE

RULE IS --

YOU KNOW IS DERIVATIVE OF  
THE STATUTE.

IT REQUIRES AN APPROVAL, BUT  
THE STATUTE NEVER SAYS IT  
NEEDS TO BE REAPPROVED EVERY  
TIME IT'S TAKEN OFFLINE OR  
REPAIRED --

>> SO THE COMMON SENSE  
INTERPRETATION IS THAT  
WHATEVER HAPPENS LATER IS  
MERELY AN EVALUATION NOT AN  
APPROVAL.

LET ME ASK ONE OTHER  
QUESTION, THERE'S NO OTHER  
CASE THAT ADDRESSES THIS  
ISSUE IN FLORIDA WITH REGARD  
TOE VALUATION OR APPROVAL,  
AM I CORRECT?

>> THERE IS --

>> OTHER THAN THE 5TH?

>> THERE IS SEVERAL CASES  
THAT DISCUSS THE BURDENS OF  
A APPROVED INSTRUMENT.

>> MY QUESTION IS IS THERE

ANOTHER CASE THAT STATES YOU  
NEED ONLY EVALUATE THE  
SOFTWARE, THAT THE SOFTWARE

--

THAT THE THING, NEED TO BE  
APPROVED WITH IT'S CURRENT  
SOFTWARE, THAT'S MY POINT.

>> THE 5TH DISTRICT COURT'S  
OPINION DISCUSSES THAT ONLY  
AN APPROVAL IS NECESSARY AND  
FUTURE EVALUATIONS ARE  
REQUIRED --

>> WAS THE POINT OF LAW  
DECIDED IN THAT CASE?

>> NE, AND IT'S WHAT 5TH  
RELIED ON IN REVERSING THE  
9TH IN BERNE, BUT IN THE  
SITUATION IN THE 9TH CIRCUIT  
RIGHT NOW WHERE WE HAVE  
COMPLETE CONFUSION BACK AND  
FORTH ON THIS ISSUE EVEN  
THOUGH THEY RELIED ON A CASE  
CALLED ADKINS.

TWO MONTHS LATER, THEY  
REVERSE ITSELF AND SAYS YOU

DON'T NEED --

IF YOU WANT TO CHALLENGE THE  
APPROVAL OF THIS INSTRUMENT,  
BRING IN SOME EVIDENCE TO  
CHALLENGE THIS.

>> MAY I SUGGEST SOMETHING  
SINCE YOU'RE HERE FROM THE  
DEPARTMENT, AND I SAW IN THE  
5TH DISTRICT'S FOOTNOTE,  
LOTS OF CASES THEYED DIDDED  
INVOLVED THE DEPARTMENT OF  
MOTOR VEHICLES, AND WE HAVE  
A CASE UP HERE FROM THE  
SECOND DISTRICT THAT  
INVOLVED THE DEPARTMENT OF  
MOTOR VEHICLES.

THE STATUTE IS THE PROVISION  
THAT IT GOES FROM THE  
ADMINISTRATIVE HEARING  
OFFICER TO THE CIRCUIT  
COURT.

WHY NOT INTRODUCE A CHANCE  
THAT HAS THESE CASES GO TO  
THE APPELLANT COURSES  
BECAUSE THEY'RE EFFECTING

THOUSANDS OF PEOPLE EVERY  
TIME THIS IS HAPPENING.  
THEY'RE UNPUBLISHED  
OPINIONS, NOT SAYING THE  
CURRENT PROCESS --  
IT IS WHAT IT IS, AND THE  
DISTRICT COURTS OF APPEAL  
HAVE TO ACT VERY CAUTIOUSLY,  
BUT IT SEEMS, WHEN LOOKING  
AT THIS CASE, THREE JUDGES  
DECIDED IT, ORLANDO HAS A  
VERY SOPHISTICATED SYSTEM,  
AND THEY'RE NOT BEING  
PUBLISHED AS DECISIONS AND  
THEY'RE NOT REALLY BINDING  
ON ANYBODY, AND THAT'S JUST  
ONE SUGGESTION.

23 WE AGREE WITH YOU THAT  
THE 5TH DISTRICT GOT IT  
RIGHT THAT THE PLAIN  
LANGUAGE FOLLOWED ONLY  
REQUIRES EVALUATION.  
WHAT ABOUT THE CHALLENGE  
THAT THE MACHINE ITSELF WAS  
NEVER PROPERLY APPROVED

BECAUSE OF ALL OF THESE  
MALFUNCTIONS AND FAILURES  
THAT IT IS, THAT THERE IS  
CONFLICT WITH GB BECAUSE YOU  
HAVE THIS --

THE SKIPPER AND ALL OF THIS  
TESTIMONY, THAT SHOWS THAT  
THERE ARE SOME PRETTY BAD  
DISCREPANCIES IS  
SIGNIFICANT.

WHY --

BUT THE POSITION HERE DID  
REPUT THE PRESUMPTION OF  
COMPLIANCE BY SHOWING ALL OF  
THIS, THEY DID NOT REPUT IT  
BY SHOWING SUBSTANTIAL  
COMPLIANCE.

IT THAT RAISED AS A  
LITIGATED ISSUE?

>> I BELIEVE SO, BUT IF YOU  
LOOK AT THE RECORDS IN THIS  
CASE, THERE WAS NO EVIDENCE  
PRESENTED BY MR. BURN --  
BERNE AT THE LEVEL THAT HIS  
BREATH RESULTS WERE

INACCURATE.

THERE ARE SPECIFIC FINDINGS  
BY THE THIRD DISTRICT COURT  
THAT BEFORE THE HEARING  
OFFICER, THEY BROUGHT IN  
EVIDENCE TO SUPPORT THAT THE  
INTOXIZER WAS NOT WORKING  
CORRECTLY THE NIGHT OF HIS  
ARREST, AND THEY SAID ON  
THAT NIGHT OF HIS ARREST,  
THIS PARTICULAR INSTRUMENT  
WAS NOT WORKING PROPERLY,  
AND THAT WAS BROUGHT TO OUR  
HEARING OFFICERS.

IN THIS CASE WE DON'T HAVE  
THAT.

>> WHAT IS ALL OF THAT  
TESTIMONY, WHEN THIS WAS  
MACHINE INACCURATE.  
A STUDY WAS DONE YEARS  
BEFORE, WHERE FDLE DID  
RANDOM SAMPLINGS AND FOUND  
THAT SOME OF THEM WERE  
ACCURATE AND SOME WERE NOT,  
AND OVERALL THEY WERE

ACCURATE.

>> THOSE WERE, AS I

UNDERSTAND IT, AND CORRECT

ME, THAT WAS THE 80 --

8109 ERRORS

WE'RE TALKING ABOUT THE

ERRORS IN MAY 06 BEFORE THE

JULY 06 CASE, AND THE

SOFTWARE PRODUCED ERRORS,

AND IN AUGUST OF 06 THERE

WERE ERRORS, IT WAS NOT THE

NIGHT OF THE EVENT, BUT

THERE WERE BOTH BEFORE AND

AFTER, AND SEPTEMBER 06

EVIDENCE THAT THE MACHINE --

THAT THE DEFENDANT'S MACHINE

MALFUNCTIONED.

SO THAT'S THE FACTS WE'RE

DEALING WITH, AND YOU'RE

SAYING YOU HAVE TO HAVE THE

EVIDENCE ON NIGHT IN

QUESTION BEFORE IT GENERATES

THE NEED OR REQUIREMENT THAT

YOU GO FORWARD AND SHOW

SUBSTANTIAL COMPLIANCE >>

THIS COURT SAID THAT IN  
DONALDSON, IT WAS REQUIRED  
FOR THEM TO COMPLY IS THE  
MONTHLY AND ANNUAL  
INSPECTION.

THEY SHOW THE INSTRUMENT WAS  
WORKING ACCURATELY AND IT  
WAS PROPERLY APPROVED AND  
INSPECTED, NOTHING REFUTED  
THAT.

>> WHAT WAS THE IN EVIDENCE  
MAY AND AUGUST,  
DISCREPANCIES AND ERRORS,  
THAT WAS NOT FROM THE  
DEPARTMENT?

OR FROM THE SHERIFF?

>> I THINK THOSE WERE  
STUDIES THEY BROUGHT IN,  
EVEN IF THEY WERE FROM THE  
SHERIFF'S OFFICE, EVEN IF IT  
WAS THAT PARTICULAR SAME  
INSTRUMENT, THAT DID ANOTHER  
MONTHLY INSPECTION OF THAT  
MACHINE AND SHOW IT WAS A  
COMPLIANCE.

>> WHAT'S THE AUGUST 06

ERRORS SHOWN?

MY NOTES INDICATE THIS

RECORD WOULD NOW THERE WERE

ERRORS WITH THE SOFTWARE IN

AUGUST OF 06, AM I INCORRECT

ON THAT ASSUMPTION?

>> IF THE EVIDENCE --

>> IN THIS CASE.

>> IN THIS CASE WE NEED TO

LOOK AT THE EVIDENCE

SPECIFICALLY TO THE MONTH

AND THE DATE OF THE USE.

>> RIGHT BUT YOU MAKING

BROAD STATEMENTS WITH THAT

THERE WERE NO OTHER EVIDENCE

OF ERRORS AND I WAS UNDER

THE IMPRESSION THAT WERE

WERE ERRORS IN MAY, BEFORE,

AND AUGUST, AFTER.

>> NOT ON THIS PARTICULAR

INSTRUMENT.

>> ON THE SOFTWARE.

>> ON THE SOFTWARE BUT NOT

ON THIS INSTRUMENT.

>> AND IN SEPTEMBER THE  
INSTRUMENT MALFUNCTIONED.

>> >> IN SEPTEMBER.

>> IT COULD HAVE BEEN BUT  
THE HEARING OFFICER --

>> YOU'RE SAYING THE  
EVIDENCE HAS TO BE ON THE  
NIGHT IN QUESTION, OR THE  
MONTH, YOU WOULD ACCEPT.

>> EXACTLY.

>> IT SEEMS TO ME EVEN I  
LOOK AT DONNELSON, VOTES  
WERE COUNTED IN BUSH VERSES  
GORE, WE THOUGHT THE VOTES  
WERE COUNTED, IT SEEMS TO ME  
THAT THESE TESTS ARE LIKE  
100% ACCURATE, AND IT IS A  
GRAVE CONCERN TO ME, THAT IF  
A HEARING WHEUFERS HAS THE  
--

OFFICER THAT HAS THE POWER  
TO KEEP THIS IN OR NOT, AND  
THE --  
THESE LAWYERS OR NONLAWYERS  
THAT ARE HEARING THESE

CASES, I THINK THIS WAS A  
NONLAWYER, BUT SOMEBODY  
THAT'S NOTS EVEN TRAINED IN  
LAW, AND YOU HEAR THAT  
PRETTY CLOSE IN TIME, THERE  
ARE --

THIS ISN'T LIKE A TECHNICAL  
GLITCH, THESE WERE  
SIGNIFICANT DIFFERENCES,  
DOESN'T THAT CALL INTO  
QUESTION ENOUGH ABOUT THE  
ACCURACY ENOUGH TO SHIFT THE  
BURDEN TO THE DEPARTMENT TO  
EXPLAIN WHAT THAT'S ALL  
ABOUT?

HOW DID THAT HAPPEN?

IS IT THE PERSON EVALUATED  
THEN THAT WASN'T A GOOD  
TEST?

SOMETHING TO EXPLAIN WHY  
THERE REALLY ISN'T A PROBLEM  
THAT YOU HAVE NO REASON TO  
QUESTION THE ACCURACY OF THE  
TESTING.

>> YOUR HONOR, EVEN IF

THAT'S THE CASE --

>> I'M ASKING YOU THAT  
QUESTION.

SHOULDN'T WE BE CONCERNED IF  
SOMETHING CLOSE IN TIME  
SHOWS INACCURACY --

IT'S STILL THE HEARING  
OFFERS TRIER OF FACT, TO  
MAKE NEW EVIDENCE AND MAKE  
NEW FINDINGS IS IMPROPER IN  
THESE CASES --

>> THAT'S A DIFFERENT, SO  
NOW THE ARGUMENT IS THAT IN  
THE SECOND TIER REVIEW FOR  
THE CIRCUIT COURT, THAT THE  
CIRCUIT COURT EXCEEDED IT'S  
AUTHORITY BY REWEIGHING THE  
EVIDENCE.

>> EXACTLY AND MAKING NEW  
FINDINGS OF FACT.

>> IS THAT WHAT YOU ARGUED  
IN FRONT OF THE 5TH  
DISTRICT.

>> YES, YOUR HONOR, BEING  
ASKED TO --

>> ISN'T IT A QUESTION OF WHO HAD THE BURDEN, DID THE HEARING OFFICER RECOGNIZE WHAT WAS PRESENTED BY THE PETITIONER HERE WAS SUFFICIENT TO SHIFT THE BURDEN, ISN'T THAT A LEGAL THRESHOLD ARGUMENT? IN OTHER WORDS, DID HE PUT UP ENOUGH EVIDENCE TO SHIFT THE BURDEN TO THE DEPARTMENT? AND AT THAT POINT IF YOU RECOGNIZE, AND THE DEPARTMENT PROVES IT'S OKAY, BUT I THOUGHT THE DEPARTMENT SAW NOTHING --

>> THERE IS NOTHING IN FINDINGS BY THE DISTRICT COURT THAT SAYS THERE WAS EVIDENCE TO SHOW THAT THESE RESULTS WERE NOT INACCURATE, BUT THE 9TH CIRCUIT RELIES ON THIS WAS AN APPROVED INSTRUMENT TO BEGIN WITH OR

NOT.

THE FACT OF THE MATTER IS  
THERE WAS NO EVIDENCE  
BROUGHT IN TO SPECIFICALLY  
SHOW THAT THIS INSTRUMENT  
WAS NOT WORKING ACCURATELY.

THE ONE WITNESS THAT  
APPEARED BEFORE THE HEARING  
OFFICER, THE FDLE OFFICER  
THAT WAS SUBPOENAED BY  
MR. BERNE SAID IT WAS  
WORKING ACCURATELY, THERE'S  
NO NEED FOR APPROVAL, THE  
RESULTS WERE ACCURATE.  
HE HAD THAT EVIDENCE BEFORE  
HIM OR HER --

>> SO THEN THE CIRCUIT COURT  
DID NOT REWEIGH THE  
EVIDENCE, THEY JUST  
INTERPRETED THE TEST TO  
REQUIRE THAT APPROVAL --  
THE STATUTE AND THE RULE TO  
REQUIRE APPROVAL WHEN  
THEY'RE SOFTWARE CHANGES.  
>> THE HEARING OFFICER HAS

--

>> IT'S A LEGAL DECISION?

>> THE FACT IS WAS IT

APPROVED OR NOT AND WE HAVE

FINDINGS BY FDLE THAT SHOWS

IT WAS AN APPROVALLED

INSTRUMENT ON THE NIGHT OF

THE ARREST AND ARGUMENTS

SAYING IT WASN'T.

THIS WAS THE INSTRUMENT AND

THE INSTRUMENTS THAT COMPLY

WITH --

>> DOES THE HEARING OFFICER

MAKE THOSE FINDINGS IN

WRITING ON THAT, ON THIS

ISSUE?

>> THERE'S SECTIONS OF A

FINAL ORDER, MOTIONS AND

OBJECTIONS WHERE THIS WAS

RAISED AND ANSWERED.

THERE IS A EFFECT SCOPE OF

REVIEW FOR THESE OFFICERS

THAT THEY MUST FIND THERE

WAS A LAWFUL ARREST AND THAT

THE DRIVER BLEW A .08 OR

HIGHER.

BUT FOR THE APPROVED  
INSTRUMENT OR NOT IT'S A  
SPECIFIC SCOPE OF REVIEW,  
DID THEY REFUSE A BREATH  
TEST OR NOT, .08 OR NOT --

>> CAN I ASK A DIRECTLY  
LEGAL QUESTION, BUT  
SOMETHING THAT CONCERNED ME,  
WE'RE IN 2011 HERE, I THINK,  
YES --

THE ARRESTS IN THIS CASE WAS  
IN THE SUSPENSION WAS IN  
2006 --

THE CIRCUIT COURT IN IT'S  
APPELLANT CAPACITY DIDN'T  
RENDER A DECISION UNTIL  
2009, IS THERE, IN THE  
RECORD, AN EXPLANATION FOR A  
THREE YEAR DELAY IN  
SOMETHING THAT REALLY NEEDS

--

AGAIN IF I GUY LOST HIS  
LICENSE AND SHOULDN'T, I  
WOULD IMAGINE THE SUSPENSION

WAS LONG SINCE COMPLETED

WHAT'S GOING ON.

>> I DON'T KNOW WHY THE 9TH

IS TAKING SO LONG, BUT AS I

MENTIONED BEFORE, THERE IS

EVIDENCE OF GREAT DESPAIRTY

IN THIS COURT AND --

>> I'M JUST ASKING WHY --

IS THERE A DELAY OF THESE

CASES FOR YEARS?

>> IN SOME CIRCUITS THERE

COULD BE OUT OF, YOU KNOW

IT'S OUT OF THE PARTY'S

CONTROL, BUT IN THIS CASE

THE 5TH COMES IN AND TRIES

TO STRAIGHTEN THESE OUT.

THEY TELL THEM TO MOVE ALONG

INSTEAD OF HAVING MASS

CONFUSION, THE 5TH IS DOING

A PROPER ROLL AND GUIDING

THE 9TH, AND EXPLAINING WHAT

IS THE PROPER BURDEN WHEN IS

THE PROPER INSTRUMENT AND IS

IT EVALUATED IN THESE CASES,

IS IT GUIDING THE 9TH, AND

THE ADD KINS CASE AND THE  
BRADY SHOW THEY NEED THIS  
INSTRUCTION FROM THE 5TH  
WHEN THEY'RE CONSISTENTLY  
FOLLOWING THE WRONG LAW IN  
THESE CASES, AND THAT'S  
WHY THE 5TH DID NOT ERR IN  
THIS CASE.

>> IS THERE, IN THIS RECORD,  
EVIDENCE MAY OR AUGUST OF 06  
OF ERRORS IN THE SOFTWARE.

>> THERE MAY HAVE BEEN, YOUR  
HONOR.

>> IS IT YOUR POSITION THAT  
THIS DID NOT COME IN BEFORE  
THE HEARING OFFICER AND ONLY  
CAME IN ON THE --

CAME IN ON THE CERT REVIEW?  
AND THAT SEPTEMBER 06, THERE  
IS EVIDENCE THAT THIS  
MACHINE MALFUNCTIONED?  
IS THERE IN EVIDENCE THIS  
RECORD?

>> IN THIS SPECIFIC  
INSTRUMENT?

>> YES, SIR, THE MACHINE

USED ON THE DEFENDANT.

>> YES, YOUR HONOR, >> BUT

THAT WOULD HAVE COME IN

BEFORE THE HEARING OFFICER.

OKAY, AND YOUR VIEW IS THAT

WAS NOT SUFFICIENT TO SIFT

ANY KIND OF BURDEN FOR THE

STATE OR DMA OR WHOEVER HAS

TO COME FORWARD WITH IT TO

SHOW IT WAS IN COMPLIANCE ON

THE DAY OF THE EVENT, IS

THAT FAIR?

>> YES, THAT'S MY ARGUMENT.

>> THE BASIS FOR YOU WITH

THAT STATEMENT IS BECAUSE

SOMEBODY CAME IN FOR THE

STATE AND SOMEBODY CAME IN

AND TESTIFIED THAT THE

MACHINE WAS PERFORMED

ACCURATELY.

>> ON THE DATE OF USE BY

THIS DRIVER.

>> SO WHAT YOU'RE SAYING IS

THE HEARING OFFICER HAD TO

WEIGHT, TWO WITNESSES AND  
MADE A DECISION AND WE  
SHOULD NOT TOUCH THAT.  
>> THAT WOULD BE PART OF HER  
ROLE IN THIS CASE, YA.  
>> IF YOU HAVE SOMEONE COME  
IN AND SAY THE MACHINE IS  
OPERATING ACCURATELY, THEN  
UNDER WHAT CIRCUMSTANCE  
WOULD THE BURDEN SHIFT.  
>> THE BURDEN MIGHT HAVE  
SHIFTED IN THIS CASE, BUT  
THE STATE WAS ABLE TO REFUTE  
THE BURDEN AND SAY IT WAS  
WORKING ACCURATELY ON THE  
NIGHT OF THE ARREST.  
IT'S ONLY ON THE MONTHLY AN  
YULE --  
ANNUAL INSPECTIONS, TO HAVE  
EVIDENCE COME IN ON THESE  
OTHER MONTHS AND DAYS IT  
MIGHT NOT BE WORKING  
ACCURATELY, WE HAVE IN THIS  
SPECIFIC CASE, THE SKIPPER  
SAYING THERE'S NO PROBLEM ON

THIS NIGHT OF THE ARREST AND  
OTHER INSTANCES TO REFUTE  
THAT AND THEY HAVE EVIDENCE  
REPORTING FINDINGS IN THIS  
CASE.

>> THE ONLY WAY THAT SOMEONE  
WOULD EVER REQUIRE SHIFTING  
OF THE BURDEN WOULD BE IF HE  
OR SHE BLOWS INTO A MACHINE  
THAT WAS NOT APPROPRIATELY  
WORKING ON THE NIGHT IT WAS  
TESTED.

>> I BELIEVE SO.

>> SO ANY OTHER DAY, EVEN  
THOUGH A MACHINE MAY BE  
WORKING PROPERLY, THE PERSON  
HAS NO RECOURSE, IT HAS TO  
BE WORKING ON THAT DAY.

THESE PEOPLE ARE LOSING  
THEIR LICENSES, THIS IS AN  
IMPORTANT THING.

>> IT IS, BUT THE RULES OF  
THIS COURT, IT'S IMPORTANT  
THAT THE BURDEN IS MET BY  
SHOWING AN ANNUAL INSPECTION

THAT IS DONE, THAT IS THE  
DEPARTMENT'S BURDEN, IF  
THERE IS OTHER TYPES OF  
QUESTIONS, THEY HAVE STILL  
FILED THE DECISION TO GIVE  
GREATER 2008 WHICH SIDE IS  
IT WORKING OR NOT.

A CAR MAY HAVE BEEN WORKING  
FIN ONE NIGHT, TO SAY IT WAS  
WORKING THE NIGHT YOU WERE  
DRIVING IT, THAT'S A  
QUESTION OF FACT FOR THE  
HEARING OFFICER, AND IT'S  
ONLY LOGICAL QUESTION IN  
THESE --

LOGICAL QUESTION IN THESE  
CASES.

>> I'LL GIVE YOU THREE EXTRA  
MINUTES.

>> I DON'T KNOW IF YOU WILL  
USE IT, BUT I ASKED YOU  
BELOW --

[LAUGHTER]

>> I >> I WANT TO MAKE  
SURE WE'RE STICKING TO WHAT

THE ISSUES ARE THAT WERE  
DECIDED AT EACH LEVEL THE  
CIRCUIT COURT IN IT'S  
OPINION SAYS THEY ARGUE IN  
THE FIRST AND THIRD THAT THE  
BREATH TEST RESULTS OBTAINED  
BY PETITION WERE NOT  
PROPERLY APPROVED SINCE THEY  
WERE OBTAINED BY THE USE OF  
A MACHINE THAT HAD NOT BEEN  
PROPERLY APPROVED PURSUANT  
TO FDLE RULE.

THAT'S ON PAGE THREE OF THE  
OPINION.

THEN THEY GO AND SAY CLEARLY  
THE RULE END CASES THAT AN  
APPROVED DEVICE WITH A  
CERTAIN SET OF INSTRUMENTS,  
SOFTWARE OPTIONS OR  
MODIFICATIONS WILL NOT  
BECOME OBSOLETE.

THIS DUH NOT MEAN THAT NEW  
SOFTWARE BECOMES AUTOMATIC  
WHEN IT'S RELEASED.

PROPER APPROVAL IT STILL

REQUIRED UNDER THE RULES AND  
THE LAW.

I SEE NOTHING IN THIS  
OPINION THAT TALKING ABOUT  
WHAT WE HAVE BEEN SPENDING  
MOST OF THE TIME.

WHICH IS DID YOU SHOW ENOUGH  
DOUBT ABOUT THIS MACHINE TO  
SHIFT THE BURDEN TO DMV, DID  
THEY CHALLENGE THERE WAS NO  
COMPETENCE OF SUBSTANTIAL  
EVIDENCE?

IT LOOKED TO ME LIKE THIS  
OPINION, OF THE CIRCUIT  
COURT, WAS PURELY AN ISSUE  
THAT IT WAS SAYING THAT NEW  
SOFTWARE HAD TO BE APPROVED,  
AND WHERE IS IT SO THAT WE  
CAN STICK TO THIS RECORD, IN  
A YOU REGARD ALL OF THESE  
OTHER --

YOU KNOW TO THE CIRCUIT  
COURT, THAT IT WAS ALSO  
ALTERNATIVELY THESE OTHER  
ISSUES, SHIFTING OF THE

BURDEN, THE RULE DID NOT  
COMPLY WITH THE STATUTE, AND  
EVERYTHING ELSE YOU HAVE  
BEEN TALKING ABOUT THIS  
MORNING?

>> WE ARGUE THAT STARTING IN  
THE ADMINISTRATIVE HEARING,  
WHILE INTRODUCING, THEY SAY  
WE DID NOT INTRODUCE ANY  
EVIDENCE --

>> I DON'T BELIEVE THE  
CIRCUIT COURT --

THE REST OF THE OPINION,  
THEY TALK ABOUT THE  
DISCREPANCIES THAT WERE  
FOUND WITH THE BREATH  
TESTING MACHINE.

THIS IS THE CIRCUIT COURT  
OPINION, THEY GO INTO ALL OF  
THE DISCREPANCIES, THEY CITE  
AT ADKINS CASE IN THERE, BUT  
IT'S A VERY THOROUGH  
ANALYSIS FROM THE 9TH  
CIRCUIT AS TO ALL OF THE  
PROBLEMS THAT WERE

ASSOCIATED WITH THESE  
MACHINES.

THAT'S WHY THEY REFERRED TO  
THAT PARTICULAR DECISION IN  
THEIR OPINION.

AND IN ANSWER TO JUSTICE  
LOSE'S QUESTION ABOUT IS  
THERE EVIDENCE THAT THE  
MACHINE WAS MALFUNCTIONING,  
THIS VERY MACHINE REGISTERED  
SOMEBODY A .09 THOUGH THERE  
WAS NO BREATH IN THE MACHINE  
TO REGISTER OR ANALYZE.

MR. SKIPPER ON THE VERY DAY  
OF THE HEARING, IT WAS  
POINTED OUT TO MR. SKIPPER  
THAT THIS MACHINE WAS  
POINTING OUT SCIENTIFICALLY  
UNRELIABLE RESULTS AND IT  
COULD NOT ACCURATELY MEASURE  
BREATH VOLUME, AND HE SAID  
WE'RE INVESTIGATING THAT  
NOW.

SO THAT PROBLEM WAS ONGOING  
WHEN THAT MACHINE TOOK

PLACE.

YOU CAN'T TELL WHETHER OR  
NOT ANY GIVEN RESULT IS  
ACCURATE OR NOT.

>> WE --

IF WE AGREE WITH YOU, WHAT  
RELIEF DOES YOUR CLIENT GET.

>> HE WOULD GET REMOVED FROM  
HIS DRIVING RECORD, WHICH IN  
THIS DAY AND AGE, HAVING AN  
ENTRY ON YOUR RECORD  
PROHIBITS YOU FROM GETTING  
CERTAIN TYPES OF JOBS AND IT  
SLANDERS SOMEBODY'S  
REPUTATION.

>> WHAT ABOUT THE PROSECUTOR  
FOR THE DUI --

>> THAT HAS BEEN RESOLVED.  
THE PROBLEM IS, AND I'M NOT  
SURE THAT WAS EVEN RESOLVED  
WITH A DUI CONVICTION, BUT  
THESE ENTRIES AND  
ADMINISTRATIVE SUSPENSIONS  
HAVE RECORDS FOR THE REST OF  
THEIR LIFE.

SO WHAT WE'RE DEALING WITH  
IS IMPORTANT TO MANY PEOPLE  
IN THEIR LIVES IF THEY'RE  
TRUCK DRIVERS --

>> I'M NOT QUESTIONING IF IT  
WAS IMPORTANT, IT'S JUST THE  
FACT THAT THREE YEARS WENT  
BY WITHOUT HIM GETTING  
RESOLUTION.

>> THE 9TH JUDICIAL LIKE ANY  
OTHER HAS BEEN SUFFERING  
BUDGETING PROBLEMS AND SO  
FORTH, AND THAT TAKES A TOLL  
ON THEIR ABILITY TO --

IT'S FAIRLY NORMAL FOR A  
CASE THERE TO TAKE ABOUT A  
YEAR OR SO TO GET RESOLVED,  
IT'S FAIRLY NORMAL, AND  
THESE KIND OF CASES, AND I'M  
NOT SURE IF THEY'RE ON THE  
BACK BURNER OR WHAT REASON  
MIGHT BE, BUT GOING BACK TO  
THE DONNELLSON CASE FROM  
THIS COURT, THE DONNELLSON  
CASE SAYS IT HAS TO BE

APPROVED.

THE FLORIDA SUPREME COURT  
DECISION SAYS THAT, THE  
STATUTE SAYS THAT, IF YOU  
LOOK AT OTHER RULES, UNDER  
THE FDLE RULES FOR INSTANCE  
11D8002, SUBSECTION TWO AND  
SUBSECTION 21, BOTH OF THOSE  
DEFINE AN EVIDENTIARY BREATH  
TEST DEVICE HAS BEEN  
APPROVED.

THE OTHER SAYS THAT IT HAS  
TO BE CONDUCTED ON AN  
APPROVED MACHINE, WHERE THIS  
LONGSTANDING WAM HAS COME  
FROM, I CAN'T TELL YOU.

I KNOW IT'S IN THAT ONE RULE  
AND THAT'S THE ONLY RULE YOU  
SEE IT IN, BUT THAT SAME  
RULE IN THE SUBSECTION FIVE  
SAYS IT HAS TO BE EVALUATED  
FOR APPROVAL.

EVEN IN THAT RULE IT SAYS  
APPROVAL.

I DON'T KNOW WHERE THE

EVALUATION --

BUT MY POSITION IS AND MY  
CLIENT'S POSITION IS THAT  
IT'S A LESSER STANDARD IN  
THAT RULE THAN WHAT'S  
REQUIRED BY LAW.

THE REASON ALL OF THESE  
DISCREPANCIES ARE HAPPENING  
IS WHEN YOU DO AN APPROVAL  
STUDY, AND YOU DO AN  
APPROVAL, IT HAS TO BE  
PROMULGATED, THAT MEANS THE  
PUBLIC AND SCIENTIST HAVE  
ACCESS TO THAT PROCESS, ARE  
WHERE IF YOU JUST DO AN  
EVALUATION, NOBODY BUT FDLE  
HAS ACCESS TO THAT PROCESS.

I KNOW I'M OUT OF TIME, AND  
I WANT TO THANK THE COURT  
FOR YOUR INDULGENCE.

>> WE THANK YOU BOTH FOR  
YOUR ARGUMENTS.