

>> ALL RISE.  
>> SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.  
PLEASE BE SEATED.  
>> GOOD MORNING AGAIN.  
AS YOU CAN SEE, THE CHIEF  
JUSTICE IS NOT PRESENT.  
HE IS RECUSED ON THIS CASE.  
AND SO, THE CASE THAT WE'RE  
CALLING LAST CASE FOR THIS  
MORNING.  
GOODMAN, FLORIDA DEPARTMENT OF  
LAW ENFORCEMENT.  
COUNSEL.  
PARTIES READY?  
>> YES, YOUR HONOR.  
>> YOU MAY PROCEED.  
>> MAY I PLEASE THE COURT, JANE  
KREUSLER WALSH ON BEHALF OF  
PETITIONER JOHN GOODMAN.  
>> YOU WANT TO SPEAK--  
>> WITH ME MY LAW PARTNER  
STEPHANIE SERAPHIN AND TRIAL  
COUNSEL BRIAN NEWMAN.  
WE'RE ASKING THE COURT TO QUASH  
THE FOURTH DISTRICT DECISION.  
THE FDLE COLLECTION AND  
BLOOD-ALCOHOL RULES ARE  
INADEQUATE AN INCONSISTENT WITH  
THE IMPLIED CONSENT LAW?  
>> HOW DETAILED DO YOU ASSERT  
REGULATIONS NEEDLE SIZE.  
TOURNIQUETS, HOW DETAILED MUST  
THEE BE TO BE ADEQUATE AND  
VALID?  
>> I THINK AN EASY FIX IN THIS  
CASE, YOUR HONOR, REQUIRE THE  
USE OF A DUI KIT.  
MY ARGUMENTS TODAY WILL FOCUS ON  
THE NEEDLE.  
>> THIS COURT CAN'T DO THAT FOR  
SURE.  
ALL WE CAN DO.  
IS SAY, THAT, RULE IT INVALID.  
WE CAN'T ORDER ANY PARTICULAR  
RESULT, YOU AGREE WITH THAT?  
>> I DO AGREE WITH THAT.  
>> OKAY.  
>> HOWEVER THE ARGUMENT FROM THE  
FDLE, IT IS SO COMPLICATED AND

SEW DIFFICULT IN ORDER TO GET A  
FIX THAT WOULD REQUIRE THE USE  
OF APPROPRIATE NEEDLE, AND WE  
HAVE CITED THIS COURT TO  
REGULATIONS IN OTHER STATES.  
IT IS NOT THAT DIFFICULT.

WE CONTEND THE RULE IS  
INADEQUATE BECAUSE IT DOES NOT  
REGULATE WHAT TYPE OF NEEDLE  
SHOULD BE USED.

THEN THE FIX FOR FDLE IS EASY.

>> WHO DECIDES WHAT THE KIT.

>> 21 GAUGE STRAIGHT NEEDLE.

>> THIS IS STANDARD, EVIDENCE  
ESTABLISHES THAT?

>> YES, SIR.

>> WHAT IS DOES IN CIRCUMSTANCE  
THE 21 DOESN'T WORK BECAUSE OF  
VEINS, WHATEVER REASON,  
STRUGGLING, THAT THE 25  
BUTTERFLY IS REQUIRED?

ISN'T THAT IN THE RECORD THAT  
UNDER SOME CIRCUMSTANCES IT IS  
REQUIRED?

>> YES, YOUR HONOR, WE  
ACKNOWLEDGE THAT AND WE CITE AD  
RULE IN ILLINOIS SAYS USE OF THE  
DUI KIT, IF POSSIBLE TO GIVE THE  
ANALYST, NOT THE ANALYST, THE  
COLLECTOR, THE DISCRETION IF IT  
IS MEDICALLY NECESSARY OR FOR  
SOME REASON THAT APPROPRIATE  
NEEDLE ISN'T AVAILABLE TO USE A  
DIFFERENT NEEDLE.

HOWEVER, AND THIS DOVETAILS WITH  
OUR ARGUMENT WITH REGARD TO  
8.013, IN THAT EVENT THERE HAS  
TO BE DOCUMENTATION THAT A  
DIFFERENT NEEDLE HAS BEEN USED.  
RIGHT NOW THERE IS NOTHING  
REQUIRING THE COLLECTOR TO SAY  
WHAT TYPE AND SIZE OF NEEDLE IS  
BEING USED TO DRAW THE BLOOD.  
SO THE DEFENDANT HAS NO WAY OF  
KNOWING THAT A DIFFERENT SIZED  
NEEDLE OTHER THAN THAT IN THE  
KIT HAS BEEN USED TO DRAW THE  
BLOOD.

>> NOT IN THE RECORDS IN ANY  
LOCATION?

>> I'M SORRY, YOUR HONOR?  
>> IT IS NOT IN THE RECORDS IN ANY LOCATION IS YOUR POSITION?  
>> NO.  
IT CAN BE IN THE RECORD BECAUSE SOMETIMES THE COLLECTOR DOES MAKE THAT NOTATION, HOWEVER, THERE IS NO REQUIREMENT THAT THEY DO SO.  
>> THIS GOES INTO HOW SPECIFIC MUST THE REQUIREMENTS BE?  
>> WELL, WE SAY THEY NEED TO BE SPECIFIC IN THE SENSE YOU USE THE DUI KIT, AND THAT THERE BE DOCUMENTATION.  
THAT IS THE LEVEL OF SPECIFICITY THAT WE ARE SAYING NEEDS TO BE IN THE--  
>> IF WE GO TO THE NEXT, IF THE RULE IS INADEQUATE BECAUSE THE RULE SHOULD HAVE SAID USED THE DUI KIT, UNDER STATE v. MILES, DOES THAT, OBVIOUSLY THIS IS CRITICAL FOR THE CRIMINAL CASE AND WE'RE NOT DOING THIS IN A VACUUM THERE IS NO ENTITLEMENT FOR THE STATE TO HAVE PRESUMPTION OF IMPAIRMENT?  
>> THAT'S CORRECT, YOUR HONOR.  
>> BUT THE EVIDENCE-- WHAT WAS-- IS THAT IN THE RECORD?  
>> BLOOD-ALCOHOL.  
>> WAS HOW MUCH IN THIS CASE.  
>> NOT IN THIS RECORD.  
>> IF IT IS NOT IN THIS RECORD, THAT IS ALL WE HAVE IN FRONT OF US.  
>> LET ME BE CLEAR, YOUR HONOR, THAT THE FDLE DOES NOT CORRECT ME, THEY FILED A NOTICE OF SUPPLEMENTAL AUTHORITY AND IT IS IN THAT DOCUMENT.  
>> WHAT IS IT, IF IT IS IN THE FOURTH DISTRICT OTHER CASE?  
>> THAT'S CORRECT.  
>> WHAT WAS IT?  
>> EXTRAPOLATED WAS .20OR .23 DEPENDING WHICH RANGE.  
>> THE JURY WOULD NOT BE INSTRUCTED ON PRESUMPTION OF

IMPAIRMENT?

>> CORRECT.

>> IT DOESN'T GO TO THE  
ADMISSIBILITY OF THE  
BLOOD-ALCOHOL, DOES IT?

>> THE STATE WOULD THEN HAVE TO  
PROVE THE THREE-PRONGED TEST  
UNDER ROBERTSON AND IT'S A  
QUESTION OF WHO BEARS THE  
BURDEN.

UNDER IMPLIED PRESUMPTION THE  
DEFENDANT BEARS THE BURDEN UNDER  
THE ROBERTSON TEST THE STATE  
BEARS THE BURDEN AND IT WOULD  
HAVE MADE A SIGNIFICANT  
DIFFERENCE IN THIS CASE.

>> THAT ISSUE IS NOT IN FRONT OF  
US?

>> THAT'S CORRECT, YOUR HONOR.

>> BUT THE SIGNIFICANCE, IS THE  
INVALIDATION LEADS TO THE,  
WHETHER YOU GET TO HAVE THE  
PRESUMPTION OR NOT?

>> THAT'S CORRECT.

THAT'S CORRECT, YOUR HONOR.

>> YOU WERE IN ANSWER TO THE  
QUESTIONS, YOUR MAIN ARGUMENT  
HERE IS THAT IF THE REGULATIONS  
SPECIFIED THE USE OF THE DUI  
KIT, THE DUI KIT, DOES IT  
CONTAIN BOTH GAUGE NEEDLES?

>> NO ONLY CONTAIN AS 21 GAUGE  
STRAIGHT NEEDLE, WHICH IS THE  
NEEDLE WE SAY SHOULD BE USED.

>> WHAT WAS THE EVIDENCE IN THIS  
RECORD AS WHY THE 25 GAUGE WAS  
USED?

>> THE EVIDENCE IN THIS RECORD  
IS CONTAINED IN THE PETITION.  
THE PETITION ALLEGES THAT THE  
OFFICER WHO WAS AT THE HOSPITAL  
WITH THE PETITIONER GAVE THE  
NURSE THE BLOOD COLLECTION KIT.  
THE NURSE CHOSE TO SUBSTITUTE A  
25 GAUGE BUTTERFLY NEEDLE FOR  
THE NEEDLE THAT WAS CONTAINED IN  
THE KIT.

WE DON'T KNOW ANYTHING MORE THAN  
THAT, NOR DO WE NEED TO BECAUSE  
AS THE FIRST DISTRIBUTE HAD

EXPLAINED IN ITS FOOTNOTES IN MILES, IT ISN'T ABOUT THE EFFECT IN THIS PARTICULAR CASE. IT IS ABOUT THE RULE.

>> WHAT ABOUT--

>> IT IS IN THIS CASE, MILES THEY'RE TALKING ABOUT REFRIGERATION, THE ENTIRE PROCESS AND HERE, AS MY UNDERSTANDING, CORRECT ME IF I'M WRONG ON IT, THE EVIDENCE THAT THERE MAY BE CIRCUMSTANCES WHERE 25 BUTTERFLY IS NOT ONLY OKAY BUT IT'S REQUIRED, AND I THINK THAT IS WHAT JUSTICE PARIENTE WAS ASKING, WHAT RECORD WAS MADE WITH REGARD TO THAT? YOU'RE SAYING NOTHING, IS THAT--

>> WELL WE HAVE IT IN THE PETITION.

WE ALSO FROM YEATMAN THAT ANALYZED SAMPLE IT WAS REPORTED HERE WHAT SIZE NEEDLE WAS USE AND THE FDLE NEVER CHALLENGED THE ALLEGATION THAT IS IT WAS A 25-GAUGE BUTTERFLY NEEDLE.

>> THAT IS WHAT JUSTICE PARIENTE ASKED WHY?

>> WHY?

>> DID YOU PROVE THROUGH THE MEDICAL WITNESSES.

>> WE WERE NOT REQUIRED.

>> WHETHER YOU DO OR NOT WE DO NOT KNOW WHETHER IT WAS OR WAS NOT REQUIRED, IT IS JUST A FACT.

>> IT IS JUST A FACT, THAT IS CORRECT, YOUR HONOR.

WITH REGARD TO YOUR QUESTION ABOUT MILES AND REFRIGERATION, IN MILES THERE WAS NO EVIDENCE THAT THE LACK OF REFRIGERATION, THE 14 DAYS LACK OF REFRIGERATION ACTUALLY AFFECTED THE SAMPLE AND THAT BECOMES CRITICAL TO OUR ARGUMENT HERE BECAUSE THIS COURT HELD IN MILES THE FACT THAT LACK OF REFRIGERATION MAY AFFECT THE SCIENTIFIC RELIABILITY OF THE

SAMPLE RENDERS THE RULE  
INADEQUATE.

HERE WE HAVE THE ALJ DETERMINING  
THAT, NUMBER ONE, A SMALLER  
NEEDLE CAN CAUSE A CLOT.

NUMBER TWO, A CLOT CAN INCREASE  
THE BLOOD-ALCOHOL CONTENT.

BUT THEN FINDING THAT BECAUSE IT  
DIDN'T INEVITABLY PRECLUDE THEIR  
BEING ABLE TO GET A VALID  
SAMPLE, THEN THE RULE IS  
ADEQUATE, AND THAT IS NOT THE  
TEST.

THE TEST, THAT THIS COURT  
ESTABLISHED IN BOTH MILES AND  
BENDER, WAS THAT THE PROCEDURES  
IN THE RULES HAVE TO INSURE THE  
SCIENTIFIC RELIABILITY OF THE  
TEST RESULTS.

THIS RULE, AS IT PERTAINS TO  
CLOTTING, DOES NOT.

THE FDLE HAS ALREADY RECOGNIZED  
BY VIRTUE OF REQUIRING AN  
ANTI-COAGULANT THAT THAT, THAT  
CLOTTING CAN AFFECT THE SAMPLE  
SO THE ANTI-COAGULANT IS  
ESSENTIAL TO THE INTEGRITY OF  
THE PROCESS.

THIS IS SIMPLY AN EXTENSION OF  
THAT APPLIES WHERE THE  
ANTI-COAGULANT IN THE EVACUATION  
TUBE EITHER CAN NOT OR DOES NOT  
DISSOLVE THE CLOT.

IT IS UNDISPUTED IF A CLOT  
ALREADY HAS FORMED THAT THE  
ANTI-COAGULANT IN THE TUBE WILL  
NOT DISSOLVE THE CLOT.

>> LET ME ASK YOU THIS FACTUAL  
QUESTION.

SO WE HAVE A SMALL GAUGE NEEDLE  
POTENTIALLY, THAT IS ALLOWABLE  
UNDER THE RULE AND TUBING, WITH  
A BUTTERFLY SO THAT FOR A FEW  
SECONDS IT TAKES TO GET THE  
BLOOD FROM THE BODY INTO A TUBE  
WITH ANTI-COAGULANT, THE  
TESTIMONY IS THAT THAT COULD  
CAUSE SOME MICRO CLOTS, CORRECT?

>> IT COULD CAUSE MICRO CLOTS.  
IT CAN ALSO CAUSE LARGER CLOTS.

THE POINT--

>> DOESN'T MAKE ANY SENSE TO ME THAT YOU-- 16-GAUGE NEEDLE IS VERY SMALL AND TUBING IS VERY SMALL.

I DON'T SEE HOW YOU COULD CREATE ANYTHING OTHER THAN MICROCLOT IN SOMETHING THAT IS REALLY SMALL BUT--

>> YOUR HONOR, AS DIFFICULT AS IT MAY SEEM THE FDLE EXPERT TESTIFIED THERE CAN BE CLOTS THAT ARE GROSS CLOTS AND THERE CAN BE MICRO-CLOTS.

IN HIS OPINION--

>> FORMED IN A 16 GAUGE NEEDLE OR IN A TUBE?

>> BOTH, YOUR HONOR.

HE TESTIFIED THAT THE LARGER CLOTS AND THE MICRO-CLOTS CAN BOTH FORM AS A RESULT OF A SMALL BUTTERFLY NEEDLE AND HE ALSO TESTIFIED THAT IN THE EVENT A CLOT FORMS, AND IT'S TO THE POINT OF A MICRO-CLOTS IT CAN NOT BE PIPETTED THROUGH THE SAMPLE, THE ANALYST MUST DOCUMENT THAT THE CLOT IS NOT SUITABLE FOR TESTING.

THAT IS HIS TESTIMONY.

>> LET ME SEE IF I UNDERSTAND. IS THE PROBLEM WITH THE BUTTERFLY NEEDLE OR WITH THE TUBING THAT IS ASSOCIATED WITH THE BUTTERFLY NEEDLE?

I THOUGHT IT WAS THE TUBING THAT WAS THE PROBLEM THAT WOULD POTENTIALLY HAVE THE CLOTTING TAKE PLACE?

>> IT IS BOTH, YOUR HONOR.

WHEN YOU HAVE THE SMALLER GAUGE NEEDLE, IT MAKES THE DRAW ITSELF LONGER, WHICH MAKES IT EASIER FOR CLOTS TO FORM AND THEN YOU COUPLE THAT WITH THE FACT THAT YOU HAVE A LENGTH OF TUBING THAT IS ATTACHED FROM THE NEEDLE TO THE EVACUATION TUBE SO THE BLOOD HAS TO TRAVEL FROM THE NEEDLE, WHICH IS TAKING LONGER TO DRAW

THE BLOOD IN THE TUBING THROUGH THE EVACUATION TUBE.

>> IS IT NOT IMPORTANT, YOU SEEM TO SAY IT ISN'T, WHETHER OR NOT THIS PARTICULAR PERSON NEEDED, WHETHER THE PERSON DRAWING THE BLOOD NEEDED TO USE A, THE 25 GAUGE BUTTERFLY AS OPPOSED TO THE ONE THAT YOU SAY WAS IN THE KIT?

I MEAN FOR SOME REASON, PEOPLE'S VEINS ARE DIFFERENT, WHATEVER THINGS MAY HAPPEN WOULD CAUSE YOU NOT TO BE ABLE TO USE A 21-GAUGE NEEDLE?

>> WE RECOGNIZE THAT, YOUR HONOR.

NUMBER ONE IT IS NOT IMPORTANT THAT THE, THAT FACT IS NOT DEVELOPED IN THIS RECORD BUT WE RECOGNIZE THERE COULD BE CIRCUMSTANCES WHERE A DIFFERENT SIZED NEEDLE MIGHT BE APPROPRIATE AND THE FDLE CAN EASILY DRAFT A RULE TO ACCOMMODATE THAT.

>> SO YOUR CONCEPT WOULD BE THE RULE WOULD SAY THAT IN TAKING A BLOOD DRAW FOR PURPOSES OF DUI THAT THE, THE DUI KIT SHALL BE USED UNLESS--

>> IF POSSIBLE.

>> IF POSSIBLE.

SO THEN AT THE HEARING, BEFORE THE JUDGE, THE JUDGE WOULD MAKE THE DETERMINATION, WOULD THEY, THAT WHETHER IT WAS POSSIBLE OR NOT, SO AS TO ALLOW THE PRESUMPTION OR NOT ALLOW THE PRESUMPTION?

IS THAT HOW IT WOULD WORK?

>> THERE WOULD HAVE TO BE MORE. WE'RE NOT JUST SAYING JUST USING A 25-GAUGE BUTTERFLY NEEDLE IN OF ITSELF IS THE PROBLEM. THAT SETS UP THE POSSIBILITY OF THE PROBLEM BUT THE DEFENDANT WOULD ALSO HAVE TO BE ABLE TO PROVE THAT HIS SAMPLE HAD BEEN SOMEHOW AFFECTED BY THE USE OF

THE SMALLER NEEDLE.  
THERE IS MORE TO THE PROCESS  
THAN JUST THE NEEDLE IT SEVEN.  
MIGHT I REMIND THE COURT--

>> I THOUGHT YOU SAID UNDER  
MILES THEY DIDN'T HAVE TO SHOW  
THAT THE REFRIGERATION WAS A  
PROBLEM.

IT WAS A QUESTION WHETHER  
THEY'RE ENTITLED TO THE  
PRESUMPTION OR NOT IN THE  
CRIMINAL CASE?

>> NO.

IN THE CASE THAT WAS BEFORE THIS  
COURT, IN THE CRIMINAL CASE,  
THERE WOULD HAVE HAD TO HAVE  
BEEN IN ORDER TO CHALLENGE THE  
THREE-PRONG TEST OF ROBERTSON  
THERE WOULD HAVE TO BE EVIDENCE  
HOW THAT LACK OF REFRIGERATION  
AND PRESERVATION AFFECTED THE  
SAMPLE BUT--

>> LET ME ASK ANOTHER QUESTION.  
IS THERE ANY DISPUTE WITH  
DR. SHAN'S TESTIMONY, EVEN  
VISIBLE MICRO-CLOTS WOULD NOT  
MAKE A MATERIAL DIFFERENCE?  
I THINK HE SAID IN THE FINAL  
BACK SCORE COULD MAKE A  
DIFFERENCE OF .00001?

>> WHAT DR. GOLDBERGER TESTIFIED  
TO, IF IT IS A MICRO CLOT AND  
AFFECTS THE ABILITY TO PIPETTE.  
THAT SHOWS IT IS NOT SUITABLE  
FOR TESTING.

THE ALJ NOTED--

>> WAS THERE ANY DISCREPANCY IT  
HIS TESTIMONY EVEN VISIBLE  
MICRO-CLOTS CAUSE A VISIBLE  
DIFFERENCE IN THE TEST RESULTS?

>> NOT THAT I'M AWARE OF YOUR  
HONOR.

I'M SURE THE FDLE WILL CORRECT  
ME IF THAT RESPECT IF I'M  
MISTAKEN HOWEVER THE ALJ MADE A  
FINDING WHETHER OR NOT OR  
CLOTTING WILL AFFECT THE TEST  
RESULTS DEPENDS ON THE DEGREE OF  
CLOTTING IN THE SAMPLE AND THAT  
MIRROR'S DR. GOLDBERGER'S

TESTIMONY.

AND IT IS VERY IMPORTANT--

>> LET ME ASK IF THE NEEDLE AND TUBING ONLY CREATE A POTENTIAL PROBLEM, WHY ARE THEY A PROBLEM? WHY ISN'T THE PROBLEM, THERE WOULD ONLY BE A PROBLEM IF THE SCIENTISTS THAT LICENSED DOCTORED OR TECHNICIAN DIDN'T DO WHAT THEY'RE TRAINED TO DO AND NOTE ANY CLOTS, ISN'T THAT CORRECT?

>> YES, AND NO, YOUR HONOR. WHAT YOU'RE ASKING ME IS THE EXACT SAME QUESTION THAT THIS COURT WAS CONFRONTED WITH IN MILES.

THE DEFENSE THERE WAS THAT WE DON'T NEED TO AMEND THE RULE TO REQUIRE REFRIGERATION AND PRESERVATION BECAUSE EVERYBODY KNOWS HOW TO DO THIS.

THESE ARE UNIVERSAL PROCEDURES, FOLLOWED BY EVERY SINGLE ANALYST, WHO CONDUCT AS BLOOD TEST RESULT AND THE SAME IS TRUE HERE.

IF THERE IS A PROBLEM WITH THE SAMPLE THAT IS CAUSED BY THE LACK, BY THE USE OF A SMALL NEEDLE, THAT RESULTS IN CLOTTING THERE IS NO REQUIREMENT THAT THEY DOCUMENT.

THERE IS NOTHING IN THE RULES PRESENTLY THAT THAT REQUIRES THEY DO THAT.

AND--

>> WHAT IS THE EVIDENCE ON THAT THOUGH THAT IS THE STANDARD OPERATING PROCEDURE FOR LABORATORY PROCESSING?

>> THE WORD YOU CHOSE YOUR HONOR, IS CRITICAL, YOU SAID IS THAT THE STANDARD OPERATING PROCEDURE AND THE ANSWER IS FOR SOME BUT NOT FOR ALL, AND FOR THE PALM BEACH COUNTY SHERIFF'S OFFICE, THE TESTIMONY WAS THAT IT IS NOT IN THEIR STANDARD OPERATING PROCEDURE--

>> NO, I AM SAYING IN A WRITTEN STANDARD OPERATING PROCEDURES, I SAID WITHIN STANDARD OPERATING PROCEDURES, WRITTEN OR NOT?

>> WITHIN THEIR GUIDELINES THAT THEY USE ON A DAILY BASIS THEY SAY, YES, BUT THERE IS NO REQUIREMENT THAT THEY DO SO AND THE ABSENCE OF THAT REQUIREMENT IS WHAT RENDERS THE RULE INADEQUATE.

AND AGAIN, WE'VE CITED CASES AND CITED RULES IN OUR REPLY BRIEF WHERE OTHER STATES DO REQUIRE DOCUMENTATION.

IN FACT--

>> I WANT TO REMIND YOU'RE INTO YOUR REBUTTAL BUT YOU CAN CONTINUE?

>> I JUST WANT TO MAKE THIS ONE POINT.

THE FLORIDA DRUG-FREE WORK PLACE STANDARDS CURRENTLY REQUIRE THE USE OF A DRUG COLLECTION KIT TO DRAW A SAMPLE, AND FOR PURPOSES OF THIS QUESTION, YOUR HONOR, THEY ALSO REQUIRE DOCUMENTATION, STANDARDS THAT BE ESTABLISHED FOR THE ACCEPTANCE AND REJECTION OF A SAMPLE.

SO ON THAT NOTE I WOULD LIKE TO RESERVE THE REST OF MY TIME.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

I'M RACHEL NORDBY FROM THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE DEPARTMENT. BEFORE THE ADMINISTRATIVE LAW JUDGE, MR. GOODMAN HAD THE BURDEN TO PROVE THE DEPARTMENT'S RULES WERE INVALID BY A PREPONDERANCE OF THE EVIDENCE. HE FAILED TO MEET THAT BURDEN. INSTEAD AS THE FOURTH DISTRICT EXPLAINED, GOODMAN'S CHALLENGE SEEKS OVERBROAD SOLUTION IN SEARCH OF A PROBLEM THAT DOES NOT EXIST.

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTIONS IN THE

NEGATIVE AND APPROVE THE FOURTH DISTRICT'S DECISION BECAUSE THE DEPARTMENT'S RULES SUFFICIENTLY REGULATE BOTH BLOOD COLLECTION AND BLOOD-ALCOHOL TESTING IN A MANNER THAT INSURES THE RELIABILITY AND ACCURACY OF THE TEST RESULTS FOR PURPOSES OF FLORIDA'S IMPLIED CONSENT LAW.

>> LET'S GO INTO THE SPECIFICS. WE DON'T HAVE MUCH TIME HERE. YOUR OPPOSITION ASSERTS AND FIRMLY ASSERTS THAT THE USE OF A 25 BUTTERFLY NEEDLE IS JUST BECAUSE IT LEADS TO CLOTTING IS, IS NOT IN ACCORD WITH STANDARD PROCEDURES AS I TAKE IT WHAT THE ARGUMENT IS.

IT IS NOT IN THE KIT AND IT IS JUST SOMETHING NOT CONTEMPLATED.

>> THERE ARE A COUPLE OF POINTS I WANT TO ADDRESS IN ANSWER.

>> ALL RIGHT.

>> YOUR QUESTION, FIRST AND FOREMOST THE ADMINISTRATIVE LAW JUDGE FOUND ON PAGE 418 OF THE RECORD IN HIS ORDER AS A FACTUAL FINDING THE LACK OF NEEDLE REQUIREMENT IN THE RULE IS OF NO MATERIAL CONSEQUENCE.

I WANT TO DRAW YOUR ATTENTION TO WHAT THE STATUTE, WHAT FLORIDA'S IMPLIED CONSENT STATUTES REQUIRE.

UNDER FLORIDA'S IMPLIED CONSENT LAW, ONLY SPECIFIED, TRAINED AND LICENSED PROFESSIONALS MAY CONDUCT THESE BLOOD DRAWS.

SO THE STATUTE, IN ESTABLISHING ONLY CERTAIN PEOPLE WHO CAN DO THESE DRAWS FOR PURPOSES OF IMPLIED CONSENT RECOGNIZES THAT THEY'RE GOING TO BE TRAINED TO DO THESE DRAWS, AND, THERE IS NO NEED FOR A NEEDLE REQUIREMENT IN THE RULES BECAUSE THAT WOULD IMPEDE THE EXERCISE OF PROFESSIONAL JUDGMENT BY THOSE TRAINED AND LICENSED PROFESSIONALS.

>> BUT OPPOSITION SAYS THERE OUGHT TO BE A STANDARDIZED KIT AND A 21 NEEDLE IS THE STANDARD THAT SHOULD BE UTILIZED AND REQUIRED, AND I ASSUME THEN WE WOULD SHIFT THE BURDEN TO THE MEDICAL PROFESSIONAL WHO IS DRAWING IT, IF IT IS NOT?

>> CERTAINLY THERE'S RECORD EVIDENCE FROM MULTIPLE WITNESSES IN THE RECORD WHO TESTIFIED AS TO THIS THAT THERE ARE OCCASIONS WHERE YOU WANT TO DEVIATE FROM THE STANDARD GAUGE DUE TO PATIENT PHYSIOLOGY, INCAPACITATION, COMFORT, SO, THERE IS RECORD EVIDENCE THAT SUPPORTS DEVIATING FROM THE STANDARD GAUGE NEEDLE. CERTAINLY THEIR RESPONSE IT IS AN EASY FIX TO REQUIRE THE KITS BE USED.

FIRST AND FOREMOST, FDLE DOESN'T PROVIDE THE KITS. THEY ARE PURCHASED BY THE INDIVIDUAL LAW ENFORCEMENT AGENCIES THROUGHOUT THE STATE. SO WE DON'T HAVE MUCH EVIDENCE IN THE RECORD AS TO, YOU KNOW, WHO IS MANUFACTURING THESE KITS OR WHAT'S TRULY STANDARD. SO, THAT'S ONE ISSUE. BUT, I WANT TO BRING IT BACK TO THE BIG PICTURE. THE QUESTION BEFORE THIS COURT IS NOT, WOULDN'T IT BE A EASY FIX? COULDN'T WE JUST TWEAK THE RULES? WOULDN'T THIS BE A SIMPLE SOLUTION. THAT IS NOT THE STANDARD. THE STANDARD IS, ARE THE RULES INADEQUATE OR INCONSISTENT WITH THE PURPOSES OF FLORIDA'S IMPLIED CONSENT LAW?

>> THAT IS WHAT SHE SAYS WEIGHS INTO THE MILES ARGUMENT THAT THE REFRIGERATION REALLY MAY OR MAY NOT HAVE AN IMPACT BUT THE

JUDICIAL REQUIREMENTS ARE THAT IT BE REFRIGERATED AND THAT THEREFORE WE NEED THAT WITH REGARD TO THE DRAW ITSELF.

>> THERE ARE SEVERAL IMPORTANT THINGS I WANT TO NOTE ABOUT MILES.

FIRST AND FOREMOST, THE EVIDENCE BEFORE THE COURT, THE TRIAL COURT FINDINGS IN MILES, WHAT MADE IT ALL THE WAY UP BEFORE THIS COURT, IT WAS NOT JUST ABOUT REFRIGERATION.

IT WAS USE OF A-- REFRIGERATION.

IT WAS PRESERVATIVE IN THE TUBE. THE PRESERVATIVE IS THE ANY DEGRADATION THAT MAY HAPPEN TO THE HEAT.

THE USE OF A PRESERVATIVE IN THE TUBE HAD A DUAL PURPOSE.

IT PREVENTS OXIDATION OF THE BLOOD SAMPLE.

IT COUNTER ACTED EFFECT OF MICROORGANISMS THAT MIGHT BE PRESENT.

THE STATE MADE THE ARGUMENT, EVERYONE KNOWS YOU KEEP THE BLOOD SAMPLES REFRIGERATED. THAT IS STANDARD.

THAT DIDN'T ACCOUNT FOR UNDISPUTED EVIDENCE IN THE RECORD THAT FOUND THE IMPORTANCE OF THE USE OF A PRESERVATIVE.

THIS COURT BASED ON THE TRIAL COURT FINDINGS IN THAT CASE SAID, BECAUSE THESE ARE ALL THREE COMPONENTS, THE REFRIGERATION, PRESERVATIVE AND ANTI-COAGULANT GO TOWARD THE CHAIN OF INTEGRITY OF THAT BLOOD SAMPLE THEN THE RULES ARE INCONSISTENT AND INADEQUATE WITH THE PURPOSE OF INSURING--

>> THAT IS WHAT THEY'RE TRYING TO ARGUE HERE.

I THINK THAT IS WHAT THEY'RE TRYING TO ARGUE, IS THAT THE SMALLER GAUGE NEEDLE AND IT IS GREATER PROPENSITY TO PERMIT

CLOTTING IS IN THE SAME CATEGORY AS THAT.

>> BUT IT IS NOT BECAUSE THE DEFECTS AT ISSUE IN MILES WERE ESSENTIALLY LATENT DEFECTS. SO IF YOU HAD A SAMPLE THAT DID NOT HAVE A PRESERVATIVE, YOU WOULDN'T KNOW, SO ONCE, SO THERE ARE TWO STAGES.

THERE IS BLOOD COLLECTION. AND THEN ONCE ENTERS THE LAB THE BLOOD-ALCOHOL TESTING STAGE. SO THE ISSUE IN MILES WAS THAT ONCE IT GOT INTO THE LAB, NO MATTER HOW PERFECT THAT LABORATORY ENVIRONMENT WAS, NO MATTER WHAT QUALITY CONTROLS THEY HAD IN PLACE TO INSURE RELIABLE TESTING THE ANALYST WOULD HAVE NO WAY OF KNOWING IF THE LACK OF A PRESERVATIVE HAD ANY EFFECT ON THAT BLOOD SAMPLE. HERE, CONSISTENT RECORD EVIDENCE IN THIS CASE BEFORE YOU MAKES IT VERY CLEAR THAT CLOTTING, THE DEGREE OF CLOTTING THAT WOULD HAVE AN IMPACT ON THE ACCURACY OF THE TEST RESULT, IT IS AN OBVIOUS DEFECT.

YOU'RE GOING TO, IT IS GOING TO BE APPARENT WHEN YOU HOLD THE TUBE, YOU'RE GOING TO HEAR THE CLOT THUDDING IN THERE.

IF IT'S A SMALLER CLOT, WHEN YOU OPEN IT TO PIPETTE OUT THE SUB SAMPLE FOR THE TESTING PROCEDURES THE CLOT WILL CLOG UP THE PIPETTE.

IT IS OBVIOUS DEFECT ANALYSTS IN THE LABORATORY WOULD DISCOVER AND THEY DOCUMENT--

>> THE RESPONSE AND ARGUMENT, I UNDERSTAND, I'M TRYING TO FOLLOW THIS THROUGH, BECAUSE THERE ARE NO UNIFORM REQUIREMENTS WRITTEN DOWN SOMEPLACE WITH REGARD TO WHAT THE TECHNICIAN IN ANALYZING LABORATORY DOES IN REGARDS TO SHAKING, LOOKING AT, WHATEVER, THAT IS DEFICIENT TRYING TO

CONNECT THE TWO.  
THAT IS THEIR ARGUMENT.  
>> BASED ON CONSISTENT RECORD  
EVIDENCE ANALYST, FORMER  
ANALYST, EVERY LAB DIRECTOR, THE  
RECORD EVIDENCE WAS THAT IF YOU  
DETERMINE THERE IS ANY DEFECT IN  
THE BLOOD SAMPLE, NO MATTER WHAT  
IT IS, YOU DOCUMENT IT.  
IF IT RENDERS IT UNSUITABLE FOR  
TESTING, THEN YOU DON'T TEST IT  
AND THE ALJ IN ITS FINAL ORDER  
AT PAGE 419 OF THE RECORD FOUND  
THAT THIS SCREENING AND  
DOCUMENTATION WAS A QUOTE,  
MATTER OF STANDARD LABORATORY  
PRACTICE.  
IT GOES TO THE HEART OF THE  
SCIENTIFIC METHOD, YOU DOCUMENT.  
SO ON THE BACK END IF YOU KIND  
OF TAKE THIS UP TO THE FRAMEWORK  
OF FLORIDA'S IMPLIED CONSENT  
LAW, WHAT THE STATUTES HAVE  
BUILT IN PLACE, CONCERNING HOW  
THIS OPERATES, THERE ARE SEVERAL  
SIGNIFICANT BACKSTOPS FOR  
ADDRESSING ANY REASONABLE  
CONCERNS THAT A CRIMINAL  
DEFENDANT MIGHT HAVE OVER THEIR  
GIVEN TEST RESULTS.  
FIRST, THE PRESUMPTIONS ARE  
REBUTTABLE.  
ANY DEFENDANT CAN ATTACK THEIR  
TEST RESULTS IN COURT.  
THE DEFENDANT, UNDER 316.1932,  
SUBPARAGRAPH F.  
SUBSECTION F, SUBPARAGRAPH 4,  
THE DEFENDANT HAS ACCESS, QUOTE,  
TO FULL INFORMATION CONCERNING  
THE RESULTS OF TEST, END QUOTE,  
INCLUDING THE PROCEDURES  
FOLLOWED.  
THAT IS IN THE STATUTE.  
THEY HAVE ACCESS TO ANY FULL  
INFORMATION ABOUT THE PROCEDURES  
USED IN THEIR TEST.  
FURTHERMORE IN 316.1934,  
SUBSECTION 5, FLORIDA STATUTES,  
FDLE IS DIRECTED TO PROVIDE  
AFFIDAVIT FORMS, IF THAT

AFFIDAVIT FORM IS USED TO ESTABLISH THE ADMISSIBILITY OF THE TEST RESULTS FOR PURPOSES OF IMPLIED CONSENT THAT AFFIDAVIT MUST INCLUDE THE PROCEDURES USED IN TESTING ANY GIVEN SAMPLE AND THE DEFENDANT CAN STILL SUBPOENA THE ANALYST TO CROSS-EXAMINE ABOUT THE PROCEDURES.

SO--

>> THAT SOUND LIKE THERE ARE WRITTEN LABORATORY STANDARD? IS THAT WHAT YOU'RE SUGGESTING THAT THE EVIDENCE, EVEN THOUGH WE DON'T HAVE WHAT IS CALLED A HE HAVE A FORMAL SOP, THAT THERE ARE IN FACT WRITTEN LABORATORY STANDARD THAT ARE FOLLOWED, IS THAT WHAT YOU'RE TELLING US?

>> THERE ARE--

>> IN RESPONSE TO THE AFFIDAVIT THEY MUST PROVIDE THOSE.

>> SO WHAT WE HAVE IN THE RECORD, THE ANALYST IN DISCUSSING WHAT THEY DO WHEN THEY OPEN THE EVIDENCE KIT, THEY SCREEN IT.

THEY MAKE SURE THE LABELS MATCH. THEY MAKE REFERENCE TO, THEY HAVE, THE ULTIMATE TOXICOLOGY REPORT IS WHAT IS GOING TO CONTAIN THE TEST RESULTS AND IN THERE, CONSISTENT EVIDENCE NOTED THAT THEY DOCUMENT, IF THERE IS A CLOT OR ANY KIND OF ISSUE WITH THE SAMPLE, THAT WOULD BE DOCUMENTED IN THE TOXICOLOGY REPORT.

MOREOVER IT IS DOCUMENTED IN THEIR CASE FILE THAT THE ANALYST MAINTAINS.

IF THEY DO AN AFFIDAVIT, THEN IT'S DOCUMENTED IN THE AFFIDAVIT.

SO--

>> SOMETHING YOU SAID HAS TO BE SUBMITTED IN SUPPORT OF THE AFFIDAVIT?

>> WELL THE AFFIDAVIT, IF AN AFFIDAVIT IS USED TO ESTABLISH

THE ADMISSIBILITY AT, IN A  
PROCEEDING--  
>> RIGHT.  
>> THEN THAT AFFIDAVIT HAS THE  
PROCEDURES IN IT.  
>> IN THE AFFIDAVIT ITSELF?  
>> YES.  
>> OKAY.  
>> THAT IS AT FLORIDA STATUTE  
SECTION 316.1934 SUBSECTION 5 IF  
AN AFFIDAVIT IS USED.  
>> TELL US HOW YOU INTERPRET  
WHAT YOUR OPPOSITION SAYS IS  
MISSING THAT OUGHT TO BE THERE  
WITH REGARD TO THE OPERATING  
PROCEDURES?  
IN YOUR WORDS, WHAT ARE THEY  
COMPLAINING ABOUT?  
WHAT DO YOU THINK YOU'RE  
RESPONDING TO?  
>> WELL, I THINK, THEIR POSITION  
IS THAT THEY WANT IN THE RULE AN  
EXPRESS REQUIREMENT, SOMETHING  
THAT IN PRACTICE AND AS ALJ  
FOUND AS A MATTER OF FACT HERE,  
IS AN INHERENT AND IMPLICIT PART  
OF WHAT GOES ON IN A LAB.  
>> THEY WANT THAT WRITTEN DOWN.  
>> IT IS STANDARD LABORATORY  
PRACTICE.  
I WOULD LIKE TO REFER YOU--  
>> THAT IS WHAT THEY WANT  
WRITTEN DOWN?  
>> THEY WANT SOMETHING EXPRESSED  
IN THE RULES REQUIRING THAT.  
>> OKAY.  
>> THAT--  
>> THAT OR OUTLINING WHAT THE  
PROCEDURES ARE?  
>> IF YOU GO BACK TO THE  
ORIGINAL PETITION THEY WANT AN  
EXPRESS REQUIREMENT FOR  
SCREENING AND REJECTION OF ANY  
CLOTTED SAMPLE.  
SO GOING BACK TO HOW THIS  
ORIGINALLY STARTED IN DOAH.  
>> OKAY.  
>> IN THEIR PETITION I BELIEVE  
THAT IT HOW IT WAS FRAMED.  
NOW I WOULD LIKE TO, WHILE WE'RE

ON THIS ISSUE DISCUSSING THE STANDARD OPERATING PROCEDURES, TALK ABOUT BENDER AND JUST NOTE FOR THIS COURT IN BENDER, ONE OF THE ISSUES IN BENDER WAS THE TRIAL COURT IN BENDER HAD FOUND THE DEPARTMENT'S RULES INVALID BECAUSE THEY DID NOT, THEY FOUND THE DEPARTMENT'S RULES UNCONSTITUTIONAL UNDER DUE PROCESS AND EQUAL PROTECTION GROUND BECAUSE THE RULES DID NOT EXPRESSLY INCORPORATE MANUALS AND STEP BY STEP PROCEDURES FOR OPERATION AND MAINTENANCE OF THE BREATHALYZER EQUIPMENT THAT WAS AT ISSUE THERE.

AND THIS COURT, ON PAGE 700 OF THE BENDER DECISION REJECTED THAT AND SAID, NO, THE RULES EXPRESSLY NOTE THAT YOU HAVE TO, YOU HAVE TO FOLLOW, YOU KNOW, THE PROCEDURES BUT IT IS NOT A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS TO NOT HAVE EVERY SINGLE STEP OF THE PROCEDURE IN THE RULE.

I WOULD JUST LIKE TO REFER YOUR ATTENTION TO THAT.

>> OKAY.

>> HERE THE RULES REQUIRE BEFORE AN ANALYST CAN EVEN BEGIN TESTING IN A LAB THEY HAVE TO RECEIVE A PERMIT.

THEY HAVE TO SATISFY CERTAIN EDUCATION AND LICENSING REQUIREMENTS.

THEY HAVE TO SUBMIT A COPY OF THE LAB STANDARD OPERATING PROCEDURE.

THEY HAVE TO PASS PROFICIENCY TESTING.

SO THERE IS RIGOROUS QUALITY ASSURANCE CONTROLS IN PLACE THAT BEFORE AN ANALYST BEGINS TESTING BLOOD SAMPLES IN A LAB, THAT THOSE TEST RESULTS ARE RELIABLE AND ACCURATE.

SO--

>> COULD YOU ANSWER JUSTICE

QUINCE'S EARLIER QUESTION?  
NOT OF BUT OF YOUR OPPOSITION  
WHERE SHE INQUIRED WITH REGARD  
TO, WHAT ARE THE CIRCUMSTANCES  
HERE?

WHY DID THEY USE A 25 BUTTERFLY  
RATHER THAN WHAT WAS PROVIDED IN  
THE KIT?

I BELIEVE, IF I'M INTERPRETING  
CORRECTLY, AND JUSTICE QUINCE,  
CORRECT ME IF I'M WRONG, BUT SHE  
ASKED THAT QUESTION.

>> JUSTICE QUINCE, THERE IS NO  
EVIDENCE IN THE RECORD THAT 25  
GAUGE NEEDLE WAS EVEN USED.  
THERE WAS NOTHING ESTABLISHING  
THAT 25-GAUGE NEEDLE WAS  
ACTUALLY USED.

>> SO WHY ARE WE HERE?

>> WE HAVE ALLEGATION IN THE  
PETITION.

THAT IS WHAT WE HAVE IN THE  
RECORD.

WE HAVE, WE NOTE THIS IN OUR  
ANSWER BRIEF IN A FOOTNOTE WE  
NOTE THAT DURING THE DEPOSITION  
TESTIMONY OF ANALYST YEATMAN, IN  
QUESTIONING THE COUNSEL WHO WAS  
QUESTIONING SAID, THERE WOULD BE  
NO WAY OF KNOWING WHAT KIND OF  
NEEDLE WOULD BE USED UNLESS,  
LIKE IN THIS CASE, IT WAS  
REPORTED BUT SO THAT IS THE ONLY  
REFERENCE, BUT THERE IS NOTHING  
ESTABLISHING HOW IT WAS REPORTED  
OR ANYTHING.

>> THE ANALYST IN THIS CASE MADE  
NO REPORT?

OR THE REPORT DOES NOT CONTAIN  
ANY INFORMATION ABOUT THE  
NEEDLES?

>> WELL THE NEEDLE WOULD BE  
RELEVANT AT THE BLOOD COLLECTION  
STAGE.

SO THE ANALYST IN THE LAB--

>> I GUESS MY QUESTION IS, IS  
NOT CORRECT THEN.

THE PERSON WHO ACTUALLY DID THE  
DRAW, WHAT KIND OF REPORT DO  
THEY MAKE?

>> I AM, I DO NOT KNOW.  
THEY DO THE DRAW THERE.  
THE NURSE AT THE HOSPITAL.  
THEY DO THE DRAW.

>> IT DOES NOT HAVE TO SAY I USE  
THE FDLE KIT OR WHATEVER  
WHOEVER'S KIT IT IS OR I USED  
SOMETHING ELSE?

>> I AM NOT AWARE OF THAT.  
BUT ALL OF THIS ABOUT THE NEEDLE  
GAUGE, IT AGAIN IT ALL GOES  
TOWARDS, YOU KNOW, IF YOU USE  
THIS NEEDLE GAUGE, THEN THERE  
MIGHT BE CLOTTING BUT THIS IS  
ALL ON THE BACK END ADDRESSED BY  
WHAT GOES ON IN THE LABORATORY  
BECAUSE A CLOT THAT WILL AFFECT  
THE RELIABILITY AND ACCURACY OF  
A TEST WOULD BE NOTICED, IT  
WOULD BE DOCUMENTED.

>> AND THERE IS NOTHING IN THIS  
RECORD THAT SAYS THE ACTUAL  
TESTING THERE WAS A CLOT?

>> NO, YOUR HONOR.  
THERE IS NOTHING IN THE RECORD  
CONFIRMING THAT.

WHAT WE DO HAVE IS DEPOSITION  
TESTIMONY OF ANALYST YEATMAN WHO  
IS WITH THE PALM BEACH SHERIFF'S  
OFFICE LAB AND HE CONDUCTED THE  
ACTUAL TEST ON MR. GOODMAN'S  
BLOOD AND HE NOTED THAT HE TOOK  
IT OUT.

HE MIXED IT, WHICH IS, WHEN YOU  
PUT IT ON A MACHINE IN THE  
LABORATORY TO MAKE SURE THAT IT  
IS HOMOGENOUS BLOOD SAMPLE,  
THERE WAS NO INDICATION FROM HIS  
TESTIMONY THAT THE BLOOD WAS--

>> LET ME GO BACK TO THIS GAUGE,  
NEEDLE GAUGE.

THE SUGGESTION WAS THAT THE  
STANDARD USE NEEDLE IS A 21  
GAUGE.

WHAT YOU'RE SAYING NOW, THERE IS  
NO WAY TO KNOW IN THIS RECORD  
WHAT GAUGE WAS USED BUT SO, I  
GUESS WE'LL HEAR BUT I THOUGHT I  
HEARD THE NURSE USED SOMETHING  
DIFFERENT IN THE KIT, I THOUGHT

THAT WAS WHAT MISS WALSH SAID  
BUT WHAT THEY'RE SAYING, THIS IS  
A HIGH-PROFILE DUI CASE BUT  
THERE'S, THOUSANDS OF DUI CASES.  
SHOULDN'T THE DEFENDANT BE, WHAT  
THEY'RE SAYING, LET'S USE THE  
DUI KIT, AND USE A 21 GAUGE  
NEEDLE UNLESS THERE IS A REASON  
NOT TO AND DOCUMENT THAT?  
THAT'S, WHETHER IT AFFECTS THE  
RELIABILITY IN THIS CASE WOULD  
BE FOR THE JUDGE IN THE CRIMINAL  
CASE TO LOOK AT BUT LOOK AT WHAT  
DIFFERENT BURDENS OF PROOF.  
ISN'T THAT WHERE WE ARE IN THIS  
CASE?

>> I JUST WANT TO CLARIFY.  
SO WHAT WE HAVE IN THIS RECORD  
REGARDING WHAT WAS USED, ALL WE  
HAVE IS THE ALLEGATION IN THE  
PETITION BEFORE DOAH THAT HE  
ALLEGED--

>> THEY WOULD HAVE TO, IF THE  
RULE, IF WE DETERMINED THE RULE  
WAS INVALID, THE UPSHOT WOULD  
SIMPLY BE AT A HEARING IN FRONT  
OF THE TRIAL JUDGE, OBVIOUSLY  
THERE WOULD HAVE TO BE, THERE  
WOULD HAVE TO BE EVIDENCE ABOUT  
THE GAUGE NEEDLE.

IN THE CRIMINAL CASE YOU'RE  
TELLING ME THERE IS NO EVIDENCE?

>> I'M NOT AWARE OF THE  
RECORD--

>> WE'RE HAVING THIS IN  
ISOLATION.

>> IT IS UNUSUAL TO HAVE  
ADMINISTRATIVE ISSUE ON APPEAL  
WITH A CORRESPONDING--

>> THE WAY IT HAS SHAKEN OUT IS  
THAT WHETHER IT WAS OR WAS NOT A  
25 BUTTERFLY IS OF NO  
SIGNIFICANT CONSEQUENCE TO ANY  
ADVERSE EVENTS THAT MAY OCCUR  
DOWNSTREAM?

>> EXACTLY, JUSTICE.

>> THAT'S THE HEART AND SOUL OF  
WHAT THIS ARGUMENT IS ALL ABOUT.  
I MEAN WE COULD ARGUE, ANYWAY,  
GO AHEAD.

I DON'T WANT--

>> NO, EXACTLY.

THE COMPETENT-- AS FOURTH DISTRICT FOUND COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FACTUAL FINDINGS REGARDING THE LACK OF NEEDLE GAUGE REQUIREMENT AND BASED ON THIS RECORD, IT ABSOLUTELY DOES NOT SUPPORT THE DRASTIC REMEDY MR. GOODEN SEEING. INVALIDATING OF VALIDATED RULES. NO FURTHER QUESTIONS.

THE DEPARTMENT ASKS FOR THE COURT TO ANSWER CERTIFIED QUESTIONS AND APPROVE THE FOURTH DISTRICT'S DECISION.

I THANK YOU FOR YOUR TIME THIS MORNING.

>> THANK YOU VERY MUCH.

REBUTTAL.

YOU'VE GOT YOU HAVE LITTLE UNDER FOUR MINUTES.

>> LET ME BEGIN WITH WHAT THE FOURTH DISTRICT ACTUALLY FOUND. THE FOURTH DISTRICT ACCEPTED ALJ FINDINGS REGARDING CLOTTING, LET ME QUOTE, THERE WAS SUFFICIENT EVIDENCE IN THIS RECORD TO SUPPORT THE ALJ'S FINDING OF FACT THE EFFECT OF CLOTTING ON BLOOD TESTING.

THE TESTIMONY WAS CLEAR, THAT A SMALLER NEEDLE CAN INCREASE CLOTTING AND THAT CLOTTING CAN AFFECT THE ACCURACY OF THE BLOOD TEST.

THE FOURTH DISTRICT.

>> THAT WAS FINDING IN THE ABSTRACT.

THAT WAS NOT A FINDING ABOUT THIS SPECIFIC CASE, CORRECT.

>> THAT'S CORRECT, YOUR HONOR, NOR DO WE NEED A FINDING WITH REGARD TO A SPECIFIC CASE AND DON'T LET THE FDLE DISTRACT YOU IN THAT REGARD.

IT'S A RULE CHALLENGE BROUGHT BY THE PETITIONER BUT AFFECTS EVERY SINGLE INDIVIDUAL.

>> LOOK YOU CAN SAY A, THEREFORE B, THEREFORE C, BUT THAT DOESN'T NECESSARILY MEAN THAT A IS OF SUCH A CONSEQUENCE AND SIGNIFICANCE ON B AND C, WHAT HAPPENS THERE AFTER, THAT MAY BE A FACT BUT NOT ONE THAT CAUSE AS RULE TO BE INVALID, ISN'T THAT THE CASE?

>> WELL, I DON'T NECESSARILY AGREE WITH HOW YOU PHRASED IT, YOUR HONOR.

>> I'M NOT VERY SKILLED AT THAT.

>> WELL YOU ARE ACTUALLY VERY SKILLED AT THAT, BUT LET ME REMIND THE COURT, THAT WE ARE HERE TODAY BECAUSE THE ALJ MADE CERTAIN FACTUAL FINDINGS WHICH I JUST READ TO THE COURT.

THIS COURT IN MILES SAYS, AND I QUOTE, CONTRARY TO WHAT MY OPPONENT STOOD BEFORE YOU TODAY AND SAID, THE STATE--

>> I BELIEVE SHE QUOTED FROM BENDER.

>> I'M SORRY?

>> I BELIEVE SHE QUOTED FROM THE OTHER CASE.

>> NO, SHE ALSO QUOTED FROM MILES AND SAID PRESERVATION WAS NOT AT ISSUE IN MILES, THAT REFRIGERATION WASN'T AND PRESERVATION WASN'T AND SHE SAID THAT THE ONLY THING THAT THE STATE EXPERTS TESTIFIED ABOUT WAS REFRIGERATION, NOT PRESERVATIVES.

LET ME QUOTE FOR YOU.

THIS IS AT PAGE 954 OF THE DECISION.

THE STATE'S EXPERTS TESTIFIED THAT THE REQUIREMENT WAS SO FUNDAMENTAL, THAT IT DID NOT TO BE IN A RULE BECAUSE ANYONE DEALING WITH BLOOD SAMPLES WOULD BE AWARE OF THE NEED FOR PROPER PRESERVATION.

THIS COURT REJECTED THAT AND SAID, JUST BECAUSE PEOPLE SAY THEY'RE DOING SOMETHING ISN'T

ENOUGH.

IF IT MAY AFFECT THE SCIENTIFIC  
RELIABILITY OF THE TEST, THEN IT  
HAS TO BE IN THE RULE.

AND IT'S NOT.

IT IS NOT HERE IN TWO RESPECTS.  
NOT HERE IN TERMS OF THE NEEDLE  
GAUGE.

IT IS NOT IN TERMS OF  
DOCUMENTATION.

>> HOW DO YOU ADDRESS THE  
DISTINCTION THAT WAS DRAWN  
BETWEEN LATENT DEFECTS, THAT  
WOULD BE THE CASE UNDER MILES  
AND EFFECTS THAT WOULD BE--  
DEFECTS THAT WOULD BE OBVIOUS?  
ISN'T THAT A SIGNIFICANT  
DISTINCTION?

>> I DON'T THINK IT'S A  
SIGNIFICANT DISTINCTION, YOUR  
HONOR, FOR TWO REASONS.  
NUMBER ONE.

THIS COURT SAYS THAT THE TEST IS  
MAY, AND DIDN'T DRAW A LINE AND  
SAY IT DEPEND WHETHER OR NOT IT  
IS LATENT OR PATENT.

THE TEST IS WHETHER OR NOT IT  
CAN BE A EFFECT ON IT AND THERE  
CAN BE MICRO-CLOTS--

>> THEY WOULD AGREE THE DEFECT  
WAS LATENT.

>> I AGREE THE DEFECT WAS  
LATENT.

>> YOU THINK IN THIS CASE, BASED  
ON TESTIMONY AND FINDINGS OF THE  
ALJ THAT THE DEFECT WAS NOT  
LATENT.

>> IT MAY BE LATENT, IT MAY NOT  
BE LATENT.

IT MAY BE LATENT IN THE SENSE  
THE ANALYST PICKS UP THE SAMPLE  
HE CAN SEE THE CLOT.

IT MAY NOT BE LATENT IN THE  
SENSE THAT THE CLOT IS SMALL AND  
HE DOESN'T EVEN REALIZE THERE IS  
A CLOT THERE UNTIL HE GOES TO  
PIPETTE THE SAMPLE, IN WHICH  
CASE THEN HE IS AWARE OF THE  
CLOT AND ACCORDING--

>> IT IS KNOTS LATENT.

>> HE BECOMES AWAY OF IT IS NOT  
LATENT.  
>> IF HE BECAME AWARE IT IS  
LATENT BECAUSE NOW IT IS THERE  
RIGHT IN FRONT OF HIM.  
I'M SORRY.  
I HAVE IT BACKWARDS.  
IT IS PATENT.  
I'M SORRY, I MISSPOKE YOUR  
HONOR.  
I GET SO INVOLVED IN WHAT I'M  
DOING.  
>> ALL RIGHT.  
>> MY--  
>> YOU'RE OVER TIME WITH OUR  
HELP.  
IF YOU COULD JUST WRAP UP.  
>> LET ME WRAP IT UP HERE.  
IT IS CRITICAL THAT THE ANALYSTS  
IN THE LAB KNOW WHAT TYPE OF  
NEEDLE IS BEING USED.  
THAT'S SO THEY WILL KNOW THEN TO  
LOOK FOR WHETHER OR NOT THERE IS  
ANY IRREGULARITIES.  
IT IS ALSO, THEY SAID OF NO  
MATERIAL CONSEQUENCE THAT THE  
ALJ FOUND THAT.  
THAT WAS IN THE CONTEXT OF HE  
MOLLIES SIS.  
THAT IS NOT ISSUE HERE TODAY.  
THE ISSUE TODAY IS CLOTTING.  
WE'RE IN POSITION OF EVERY  
SINGLE PERSON SUBJECTED TO DUI  
TESTS IN FLORIDA DOES SO  
ASSUMING THAT THE PROCEDURES ARE  
RELIABLE.  
WE BELIEVE WE DEMONSTRATED TO  
THE COURT THAT WITH REGARD TO  
THESE TWO DEFICIENCIES THEY ARE  
NOT.  
WE WOULD ASK THIS COURT TO QUASH  
THE FOURTH DISTRICT'S DECISION  
AND REMAND THE CASE FOR FURTHER  
PROCEEDINGS.  
THANK YOU VERY MUCH.  
>> THANK YOU VERY MUCH.  
THANK YOU TO BOTH PARTIES FOR  
YOUR EXCELLENT ORAL ARGUMENTS.  
AN THE COURT IS IN RECESS.  
>> THANK YOU.

