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THE NEXT CASE IS STATE V MILES. MR. WHITE.

THANK YOU, YOUR HONOR. STEVE WHITE. EXCUSE ME. MY VOICE, A LITTLE BIT OF A BUG. BUT I AM REPRESENTING THE PETITIONER, THE STATE OF FLORIDA. ASSISTANT ATTORNEY GENERAL. THIS CASE AROSE FROM A SERIOUS ACCIDENT IN THE PENSACOLA AREA, IN WHICH A PASSENGER OF ANOTHER VEHICLE WAS KILLED, AND ANOTHER PERSON IN THE OTHER VEHICLE WAS SERIOUSLY INJURED. BLOOD WAS DRAWN AND SUBSEQUENTLY REGISTERED ABOUT .10% ABOUT .10%. CITING THE POLICY'S CONCERNS, THE TRIAL COURT, AFTER AN EVIDENTIARY HEARING, EXCLUDED, RULED THAT THE BLOOD ALCOHOL LEVEL, AS WELL AS A PERMISSIVE INFERENCE UNDER THE IMPLIED CONSENT STATUTE, WOULD BE EXCLUDED. THE STATE TOOK THE CASE TO THE FIRST DISTRICT COURT OF APPEAL. THE FIRST DISTRICT COURT OF APPEAL, CITING THE TRIAL COURT'S REASONING, AFFIRMED THE TRIAL COURT, BUT IN ADDITION TO THAT, CERTIFIED A QUESTION WHETHER THE PERMISSIVE INFERENCE WOULD APPLY IN THIS PARTICULAR CASE, IN THIS PARTICULAR SITUATION, WHERE THE STATE MEETS MEETS THE THREE -- MEETS THE THREE-PRONG TEST OF BENDER ROBINSON, AND WE SUBMIT THAT THAT IS HOW WE ENDED UP HERE BEFORE THE COURT. THE STATE SUBMITS THAT THE TRIAL COURT ERRED. IN FACT THE DISTRICT COURT OF APPEAL FAILED TO DO ITS OWN ANALYSIS OF RULES AND REGULATIONS, STATUTORY PROVISIONS, RULES OF EVIDENCE, THAT CONCERNED THE EFFECTS OF TEMPERATURE OVER TIME, WHICH IS BASICALLY WHAT WE ARE TALKING ABOUT HERE, AND IN FACT, MILLER ANBENDER, WHICH I WOULD LIKE TO TALK A LITTLE BIT ABOUT TODAY, PROVIDE NOT ONLY GUIDANCE BUT CONTROL THE ISSUE.

IS YOUR POINT, NOW, THAT THE TEMPERATURE, REFRIGERATION, DOESN'T HAVE ANYTHING TO DO WITH THE INTEGRITY OF THE SAMPLE? I THOUGHT THE POINT WAS, AS EVERYONE KNOWS THAT, REFRIGERATION HAS EVERYTHING TO DO WITH THE INTEGRITY OF THE SAMPLE, AND THEREFORE IT DOESN'T NEED TO BE IN THE REGULATION.

NO, YOUR HONOR, WE ARE NOT CONTENDING THAT REFRIGERATION WOULD NOT HAVE AN EFFECT. IN FACT IT IS UNDISPUTED BELOW THAT THE TEMPERATURE, OVER TIME, DOES AFFECT OR CAN AFFECT, EXCUSE ME, CAN AFFECT THE INTEGRITY OF THE SAMPLE, AND THAT REFRIGERATION WOULD PROLONG THE INTEGRITY OF THE SAMPLE, ALTHOUGH WE DON'T HAVE ANY EVIDENCE BELOW, AS TO HOW LONG A SAMPLE WOULD LAST, IF IT WERE REFRIGERATED. WE DON'T HAVE ANY EVIDENCE BELOW AS TO WHAT TEMPERATURE THE SAMPLE WOULD HAVE TO BE MAINTAINED, OVER WHAT PERIOD OF TIME, TO MAINTAIN ITS INTEGRITY. IN FACT THE ARGUMENT REFERS BACK TO TOM WOODS-ARGUMENT, WHICH IS UNREBUTTED AND BY THE WAY IS BASED UPON STATUTE THAT THE FDLE SHOULD CONSIDER NOT ONLY FACTORS RELATING TO RELYIBILITY BUT FACILITY, TO USE HIS TERM, FOR EASE OF ADMINISTRATION, THAT WE CAN NOT INCLUDE ALL OF THE VARIABLES IN THE RULES. THAT WE CAN'T SPECIFY CERTAIN TEMPERATURES. HOW REFRIGERATED DOES THIS HAVE TO BE? DOES THE REFRIGERATOR HAVE TO BE IN WORKINGORDER? WHAT COLD SETTING? DO WE HAVE TO HAVE A THERMOMETER AND HAVE TO VALIDATE THE THERMOMETER AND ET CETERA AND ET CETERA?

DO YOU ASK THAT WE DON'T THE POSITION OF JUDGE WOLF?

ABSOLUTELY, YOUR HONOR. NOT ONLY IN TERMS OF HIS CONCLUSIONS BUT HIS REASONING.

IN HIS OPINION, HE DISCUSSES THE POTENTIAL PROBLEM OF OUR DECISION IN MOORE. OR HOWEVER YOU WANT TO PRO YOUNS -- PRONOUNCE THAT CASE, AND THAT WAS A CASE WHERE WE SAID, NOTWITHSTANDING OUR CONCLUSION, THAT THE STATE HAD COMPLIED WITH THE STATUTE MANDATING THE ADOPTION OF RULES, AND THAT, IN THAT PARTICULAR CASE THERE

HAD BEEN COMPLIANCE. WE WENT ON TO SAY, NO, AND ACTUALLY WE GOT INVOLVED IN ESSENCE IN RULE MAKING, AND SAID IN ORDER FOR THAT REALLY TO COMPLY WITH THE STATUTE, THE STATE HAS TO DO THE FOLLOWING, WITH REFERENCE TO MAKING IT CLEAR AS TO WHAT PEOPLE THAT GIVE THIS TEST HAVE TO DO AND ET CETERA. NOW, WHAT ABOUT THAT DECISION? THAT SEEMS TO SUGGEST THAT --

YOUR HONOR, FIRST OF ALL --

-- THAT THE TRIAL COURT OR THE DISTRICT COURT OF APPEAL OR THIS COURT, OBVIOUSLY, IF IT FINDS THERE IS AN INADEQUACY THERE, IN TERMS OF THE COMPLIANCE WITH THE STATUTORY MANDATE TO DON'T RULES, OR WITH A CONSTITUTIONAL MANDATE, WITH REFERENCE TO DUE PROCESS, COULD MANDATE THAT THERE IS CERTAIN MINIMUM RULES, MAYBE, THAT HAVE TO BE OUT THERE, SO GIVE ME YOUR READ OF OUR DECISION IN THAT CASE AND HOW IT FITS HERE.

YES, YOUR HONOR. I PRONOUNCE IT MEHL. IN ANY EVENT, TWO OBSERVATIONS ON MEHL. ONE IS THAT THE HOLDING IN MEHL WAS FOR THE ADMISSIBILITY OF THE TEST RESULT. THAT WAS THE HOLDING. THE OTHER PART ABOUT YOU SHOULD PROMULGATE RULES IS DICTUM. THAT WAS NOT NECESSARY FOR THE RESOLUTION OF THE FACTUAL ISSUE BEFORE THE COURT. SECONDLY --

YOU SAY IT IS DICTA. THAT IS A PRETTY EXPLICIT MANDATE FROM THIS COURT, AS TO WHAT THE DEPARTMENT WOULD HAVE TO DO WITH REFERENCE TO ITS RULES IN THE FUTURE.

YES, YOUR HONOR, IT WAS.

I HAVE A LITTLE DIFFICULTY SAYING, WHEN THE COURT ORDERS SOMETHING TO BE DONE, THAT IT ENDS UP BEING DICTA.

WELL, OF COURSE, FDLE IS VESTED WITH THE AUTHORITY TO DO THE RULES, AND WITH ALL DUE RESPECT, NOT THIS COURT. ALTHOUGH, OF COURSE, THE FDLE RULE MAKING IS SUBJECT TO JUDICIAL REVIEW. THE RULES THAT WERE BEFORE THIS COURT IN MEHL WERE UPHELD, AGAIN, LOOKING AT THE PROIF FACTS, WHICH WERE THE BASIS FOR THE LOADING IN MEHL. MEHL UPHELD THE ADMISSIBILITY OF THE TEST RESULT. ADMITTEDLY THERE IS A THAT LANGUAGE, AND IT TROUBLED JUDGE WOLF, AND I HAVE TO CONCEDE THAT IT IS TROUBLING, BUT NEVERTHELESS WE CAN, ALSO, POINT OUT THE FACT THAT THE RULES IN MEHL CONCERNED THE OPERATION OF THE MACHINE, ITSELF, AND IF WE LOOK AT THE WHOLE BODY OF CASE LAW ON BLOOD ALCOHOL TESTING, THE TWO MAIN CONCERNS ARE CORE CONCERNS REGARDING RELIABILITY, TO USE THAT TERM, ARE THE EQUIPMENT THAT IS BEING USED AND THE PERMIT OF THE OPERATOR, AND MEHL CONCERNED THE QUALITY OF THE EQUIPMENT, THE USE, MAINTENANCE, ET CETERA, ET CETERA, OF THE EQUIPMENT, SO MEHL'S DIRECTIVE, TO USE THAT TERM, CONCERNED THAT, NOT THE CHAIN OF CUSTODY OF THE BLOOD AND WHAT MAY HAPPEN TO THE BLOOD THROUGHOUT THAT CHAIN OF CUSTODY, WHICH IS COVERED BY STANDARD RULES OF EVIDENCE AND WHICH IS UNREBUTTED THAT THE POLICE KNOW WHAT TO DO, THAT THERE IS NO ABUSE.

BUT ISN'T MEHL, WHAT IS REALLY IMPORTANT ABOUT THE DIRECTIVE IN MEHL IS THAT IT IS, FOR THE FUTURE, AS OPPOSED TO FOR THAT PARTICULAR CASE? I MEAN DIDN'T THE COURT ACTUALLY SAY, IN MEHL, THAT, BEGINNING AT A POINT IN THE FUTURE --

YES, YOUR HONOR.

-- THIS WILL TAKE PLACE?

YES, YOUR HONOR. ON A MATTER THAT DOES NOT CONCERN US, THAT DOES NOT CONCERN CHAIN OF CUSTODY AND THE EFFECTS OF TEMPERATURE OVER TIME, IT CONCERNS THE ACTUAL MACHINERY THAT WAS BEING USED TO DO THE TESTING.

BUT EVEN IF WE -- WHAT I AM GETTING AT HERE, I GUESS, IS EVEN IF WE WANT TO SAY THAT THERE IS A LACK OF RULE MAKING IN THIS PARTICULAR CASE, SHOULD WE, CONSISTENT WITH MEHL, MAKE IT APPLICABLE FOR THE FUTURE? THAT IS MY QUESTION.

WITH ALL RESPECT, AGAIN, THE FDLE IS VESTED WITH THE DISCRETION AND IT IS IN A PARTICULARLY GOOD POSITION TO USE ITS DISCRETION IN THAT IT IS INVOLVED IN LAW ENFORCEMENT TRAINING. AND THAT, IF THE RULES ARE DEFICIENT, THEY ARE DEFICIENT, AND IF THE RULES ARE SO DEFICIENT THAT WE CAN'T USE THE BLOOD, THEN SO BE IT WOULD BE THE HOLDING OF THIS COURT, BUT --

REFRESH ME, WITH REFERENCE TO DID THE TRIAL COURT HOLD THAT THE RULES WEREN'T IN COMPLIANCE WITH THE STATUTORY MANDATE, OR DID THE TRIAL COURT HOLD THAT THEY WEREN'T IN COMPLIANCE WITH DUE PROCESS WHAT WAS THE HOLDING OF THE TRIAL COURT?

YOUR HONOR, I HAVE DIFFICULTY DETERMINING THAT HOLDING, AS WELL AS THE HOLD ARE OF THE DISTRICT COURT OF APPEAL. IT MENTIONS TRIAL COURT MENTIONING CORE POLICIES, AND THE TRIAL COURT, ALSO, MENTIONS DUE PROCESS, BUT IT DOESN'T DISCUSS, FOR EXAMPLE, MILLER. THIS COURT'S HOLDING IN MILLER, WHERE ABSORPTION INTO THE BLOOD OF ALCOHOL OCCURS IN EVERY CASE. EVERY SINGLE CASE. WE -- EAR WE ARE DEALING WITH THE SPECULATIVE -- HERE WELL ARE DEALING WITH THE SPECULATIVE POSSIBILITY THAT TEMPERATURE MAY AFFECT THE BLOOD ALCOHOL LEVEL, AND IN FACT IT USUALLY DECREASES THAT LEVEL, IS THE UNREBUTTED TESTIMONY, SO THIS IS A MAYBE, A POSSIBILITY, AND IN MILLER, IT DEALT WITH A SITUATION WHERE, IN EVERY SINGLE CASE, ALCOHOL IS ABSORBED INTO THE BLOODSTREAM, AND SO THAT, AT THE TIME THAT THE BLOOD IS DRAWN, DOESN'T NECESSARILY REFLECT THE BLOOD ALCOHOL LEVEL AT THE TIME OF DRIVING.

YOUR ANSWER TO THE RESPONDENT, I TAKE IT, WOULD BE THAT, IF THERE IS A PROBLEM HERE, YOU HAVE GOT A RIGHT TO PRESECRETARY THAT TO THE -- TO PRESENT THAT TO THE TRIAL COURT IN YOUR PARTICULAR CASE, TO EITHER EXCLUDE THIS EVIDENCE OR HAVE IT SO IMPEACHED. OTHERWISE IT IS JUST LIKE BENDER, AS JUDGE WOLF POINTS OUT, AND THAT IS IF YOU PROVE COMPLIANCE WITH THE STATUTE AND WITH THE RULES, YOU GET THE PRESUMPTION, AND NOW THE BALL IS IN THE COURT OF THE DEFENDANT.

BENDER UPHELD ADMISSIBILITY IN THAT CASE. MILLER UPHELD ADMISSIBILITY. EVEN THOUGH THE RULES WEREN'T TOTALLY COMPLETE, THERE WAS SOMETHING OBVIOUSLY MISSING FROM THE RULES, BUT YOU STILL HAVE THE PROTECTION OF ATTACKING THE RELYIBILITY OF THE TEST IN THIS PARTICULAR CASE.

WE KNOW NOTHING ON THE RECORD ABOUT THIS PARTICULAR TEST OR WHAT OCCURRED. IS THAT CORRECT? AS FAR AS REFRIGERATION?

AT THE EVIDENTIARY HEARING, IN FACT, DEFENSE COUNSEL DID OB, WHEN THE STATE STARTED TO GET INTO THE PARTICULARS OF THIS PARTICULAR BLOOD. BUT THERE WAS, STILL, SOME EVIDENCE, FROM LAURA BAR FIELD, THE ANALYST, THAT THE BLOOD WAS FREE FLOWING. IT HAD NOT BEEN CLOTTED, AND THAT IT WAS NOT DETERIORATED, THIS PARTICULAR BLOOD.

AND THE TRIAL DETERMINATION, FOR INSTANCE, ON A DISPUTED RECORD OR ON AN EVIDENTIARY RECORD, AS TO WHETHER OR NOT THE RESULTS HERE WERE RELIABLE, BASED ON EVIDENCE THAT WAS HEARD IN -- THE RESULTS IN THIS PARTICULAR CASE.

I BELIEVE THE TRIAL COURT SAID THERE WAS NO INDICATION THAT IT WAS UNRELIABLE AND, IN FACT, SPECIFICALLY FOUND THAT AN ANTI-KOINGLANT, ANT -- AND A PRESERVATIVE, WERE IN THE VIALS IN THIS PARTICULAR CASE, AND I THINK, IN FACT, THE DEFENSE MOTION SAID IT WAS A BECKT AND DICK I KNOW SON -- A DICKINSON BLOOD ALCOHOL KIT AND THAT THE BLOOD WAS

MAINTAINED.

ARE THERE CUSTODY RULES AND PRESERVATION RULES?

NO, YOUR HONOR.

SO THE DELEGATION OF AUTHORITY, AS FAR AS A CRITICAL ELEMENT OF THE EVIDENCE IS ADMISSIBILITY, WHICH IS THE CHAIN OF CUSTODY, IS ABS FROM THE STATUTE AND FROM THE RULES?

CHAIN OF CUSTODY, TIME, TEMPERATURE, NOT MENTIONED IN THE STATUTE. NOW, THE STATUTE DOES REQUIRE TO APPROVE TESTING METHODS AND PERMITTING PROCEDURES, SO, I MEAN --

THE ANSWER IS THAT THEY ARE NOT IN THE RULES, BECAUSE THE STATUTE DOESN'T REQUIRE IT, GOING BACK TO, BECAUSE SOMEHOW I THOUGHT THAT AT LEAST YOUR EXPERT BELOW SAID, WELL, THEY ARE NOT IN THE RULES BECAUSE WE ALL, EVERYONE KNOWS WHAT IS NEEDED TO PRESERVE THE SAMPLES.

YES, YOUR HONOR. HE DID TESTIFY THAT IT IS UNIFORM POLICE PRACTICES NOT TO LET THE BLOOD BECOME OVERHEATED. IN FACT THE DEFENSE EXPERT COULDN'T POINT TO A SINGLE EXAMPLE IN FLORIDA WHERE THERE WAS A PROBLEM WITH THIS. SO IT IS NOT A PROBLEM. IT IS COVERED BY STANDARD RULES OF EVIDENCE. IT IS NOT REQUIRED IN THE STATUTE, AS SUCH.

BUT THAT IS, TO ME, A MORE IMPORTANT QUESTION, BECAUSE YOU WERE SAYING EARLIER WE DON'T WANT THESE RULES TO BECOME UNWIELDLY AND TOO DIFFICULT TO ADMINISTER, BUT IF THE STATUTE DOESN'T EVEN DELEGATE THE RESPONSIBILITY TO PASS RULES, WITH RESPECT TO THIS ASPECT OF THE BLOOD SAMPLE, THEN THERE CERTAINLY CAN'T AND VIOLATION OF THE -- OF ANY STATUTORY OBLIGATION.

YES, YOUR HONOR.

AND THEN THE REQUIREMENT WOULD BE FOR THE BURDEN TO BE ON THE DEFENDANT TO ATTACK THE REGULATIONS, AS BEING INADEQUATE TO ENSURE RELIABILITY. IT WOULD BE THEIR BURDEN.

IN FACT IN THIS PARTICULAR CASE THAT THE EVIDENCE IS UNRELIABLE, BASED ON STANDARD RULES OF EVIDENCE. THE POLICE ALLOWED IT TO BE CONTAMINATED WITH BACTERIA, WHAT HAVE YOU, THOSE SPECULATIVE POSSIBILITIES THAT THE DEFENSE EXPERT TESTIFIED TO THAT HAVE NOT BEEN RELATED TO THIS CASE OR ANY PRACTICAL CASE IN FLORIDA, FOR THAT MATTER.

SO THERE IS NO STANDARDS ABOUT THE TEMPERATURE OR ANYTHING IN ANY OF THE FDLE REGULATIONS?

NO, YOUR HONOR. IN FACT, IT WAS INTERESTING, IN READING OVER, I READ THE DEFENSE EXPERT'S TESTIMONY, I WAS LOOKING FOR HIS SPECIFIC PROPOSAL. WHAT SHOULD WE PUT IN THE RULES, IN TERMS OF TIME AND TEMPERATURE? I MEAN HE DIDN'T SPECIFY -- IN FACT WHENEVER THE PROSECUTOR ASKED HIM A HYPOTHETICAL QUESTION OR HE WAS ASKED A HYPOTHETICAL QUESTION TO GET TO SPECIFICS, HE BEGED OFF. HE SAID, WELL, I AM NOT GOING TO DEAL WITH HYPOTHETICALS, AND SO BASICALLY THE SITUATION THAT WE ARE IN IS THAT THE OTHER SIDE WANTS US TO SPECIFY, AND YET THEY WANT TELL US EXACTLY WHAT THEY WANT SPECIFIED, IN TERMS OF TIME AND TEMPERATURE. IT SHOULD BE REFRIGERATED BUT, AGAIN, REFRIGERATION CAN INCLUDE A VAST ARRAY OF TEMPERATURES, IN AND OF ITSELF, SO HOW LONG AND AT WHAT TEMPERATURES? AND, OF COURSE AS SOON AS WE SPECIFY ANYTHING IN THE RULES, YOU ARE HAMSTRINGING LAW ENFORCEMENT AND CREATE AGO MINEFIELD, AND IT DOESN'T COVER THE

INFINITY VARIETY OF SITUATIONS THAT DO COME UP IN LAW ENFORCEMENT, SUCH AS AN OFFICER WHO HAS TO CALL WITH A 911 CALL AND HAS TO RUSH TO THE SCENE OF ANOTHER CRIME, SO IT IS IN THE TRUNK OF HIS CAR AT MIDNIGHT, 6:00 A.M.. HOW --

WAS THERE, ALSO, AN ISSUE ABOUT WHETHER OR NOT THERE SHOULD BE SOME REQUIREMENT AS TO A CHEMICAL ADDITIVE TO PRESERVE THE VALIDITY OF THE SAMPLE?

YES, YOUR HONOR.

WHAT WAS THE EVIDENCE ABOUT THAT? AND HOW DID THAT --

THAT, IN FACT, WITHOUT A PRESERVATIVE, CAN LENGTHEN THE LIFE OF THE BLOOD, UNDER, IF YOU HOLD TIME AND TEMPERATURE TO A CONSTANT, WHATEVER TIME AND TEMPERATURE YOU ARE TALKING ABOUT, THAT IS TEMPERATURE OVER TIME, IF YOU HAVE A PRESERVATIVE, IT CAN LENGTHEN THE LIFE OF THE BLOOD, IN TERMS OF THE POSSIBILITY OF BEING CONTAMINATED. ALTHOUGH THAT POSSIBILITY GENERALLY IS A LOWER BLOOD ALCOHOL LEVEL, IN REAL PRACTICE, NOT A HIGHER ONE. THE DEFENSE EXPERT TESTIFIED ABOUT THE POSSIBILITY OF CERTAIN VAGINAL YEASTS, ANGI THINK HE NAMED ONE OTHER MICROORGANISM, OF THE POSSIBILITY OF THAT GETTING INTO THE BLOOD AND CREATING --

HE TESTIFIED THERE SHOULD BE A MORE SPECIFIC AND EXPRESS RULE?

YES, YOUR HONOR. HE WANTS THE PRESERVATIVE NAMED AND QUANTIFIED. BUT AS A PRACTICAL MATTER, AGAIN, NOT HAVING, NUMBER ONE, THERE IS A PRESERVATIVE, AND STANDARD TECHNIQUES, SO IT IS NOT A PROBLEM IN FLORIDA, BECAUSE IT IS USED, AND THERE IS NO EVIDENCE TO DISPUTE THAT, AND SECONDLY, WHEN IT IS A PROBLEM, IT GENERALLY HURTS THE STATE, SO THE STATE HAS AN INCENTIVE TO MAKE SURE THAT THE STANDARD KITS ARE USED, SUCH AS BECKT AND DICKINSON, IN THIS PARTICULAR CASE, BECAUSE OTHERWISE THE BLOOD ALCOHOL READING IS PROBABLY GOING TO BE LOWER THAN IT SHOULD HAVE BEEN. I SEE I AM INTO MY RESERVE TIME.

IF YOU WISH TO RESERVE TIME, YOU MAY.

THANK YOU, YOUR HONOR.

GOOD MORNING, YOUR HONOR. MY NAME IS ROSS KEENE, AND I REPRESENT MICHAEL RANDY MILES. WITH REGARD TO THE TRIAL COURT'S ORDER IN THIS CASE, THE TRIAL COURT'S ORDER SPECIFICALLY FOUND THAT THE RULE ADOPTED BY THE DEPARTMENT WAS INADEQUATE TO ADDRESS THE CORE POLICIES OF THE STATE IN PRESERVING A SAMPLE, IN WHICH THE RESULT IS THE INACCURATE ANALYSIS.

WHERE IS THERE ANY MANDATE FOR THAT? I MEAN, I REALIZE THAT THESE THINGS HAVE BEEN DISCUSSED IN THE CASE LAW, BUT HERE AREN'T WE LIMITED TO WE HAVE GOT A STATUTORY MANDATE, WITH REFERENCE TO THE ADOPTION OF RULES, AND AT LEAST UP TO THE POINT OF THE FILING OF THE WRITTEN BRIEFS? I DON'T SEE ANY CONTENTION HERE THAT THE STATUTORY MANDATE HAS BEEN VIOLATED IN SOME WAY. THEN I SUPPOSE THAT WE HAVE A CONSTITUTIONAL, YOU KNOW, OVERLAY, OVER THIS WHOLE THING HERE, AND I AM HAVING DIFFICULTY UNDERSTANDING WHERE THE STATE HAS GONE WRONG HERE, AND HELP ME WITH THAT. IS IT IN NOT COMPLYING WITH THE STATUTORY MANDATE? IS IT THAT THE STATUTORY MANDATE VIOLATES THE CONSTITUTION? OR IS IT THAT THE STATE, IN ATTEMPTING TO COMPLY WITH THE STATUTORY MANDATE, HAS VIOLATED THE CONSTITUTION?

I WOULD AGREE WITH ONE AND THREE, YOUR HONOR, AND I WILL GO BACK. WITH RESPECT TO THE STATUTORY MANDATE, YOUR HONOR, RESPECTFULLY IT IS VERY CLEARLY LAID OUT IN THE IMPLIED CONSENT STATUTES.

WHAT IS THE STATUTE MANDATE.

SECTION 316.1932(1) F(1). AND IT SAYS THAT THE FDLE MUST PROMULGATE RULES, AND I AM QUOTING, SPECIFY TESTS FOR THE REALIBILITY OF RESULT AND APPROVED METHOD OF ADMINISTRATION WHICH MUST BE FOLLOWED AND ALL SUCH TESTS GIVEN UNDER THIS SECTION.

THE DEPARTMENT HAS DONE THAT, HAS IT NOT?

I BELIEVE THAT THEY HAVE NOT, YOUR HONOR, AND I BELIEVE THAT THAT IS THE TRIAL COURT'S VIEWPOINT, WITH RESPECT TO THEIR DECISION, AND THAT IS --

I THOUGHT, IN OTHER WORDS, THAT YOU ARE SAYING THAT THE RULES THAT HAVE BEEN ADOPTED DON'T CARRY OUT THE STATUTORY MANDATE AND, IN FACT, VIOLATE THE STATUTORY MANDATE?

I AM SAYING, YOUR HONOR, THAT THE TRIAL COURT'S DECISION AND ORDER THAT THE RULE SPECIFICALLY IN QUESTION, AND THAT RULE SPECIFICALLY REFLECTING WEAKNESSES IN TERMS OF STORAGE, PRESERVATION AND TRANSPORTATION, THE TRIAL COURT FOUND THAT THE RULE WAS INADEQUATE ON THAT BASIS. THE TRIAL COURT, THEREFORE, FOUND, YOUR HONOR, THE FIRST DISTRICT COURT AGREED AND WE WOULD CONTEND TODAY, THAT THERE FOR THE CORE POLICIES OF THE-BIO CONSENT STATUTES, WERE NOT FOLLOWED, BECAUSE THE RELIABILITY IS THE CRUCIAL ISSUE IN THIS ENTIRE MATTER.

STILL THERE IS A GAP WITH ME THAT YOU NEED TO FILL IN. IN TERMS OF POINTING OUT WHAT IT WAS IN THE STATUTORY MANDATE THAT THE DEPARTMENT DID NOT COMPLY WITH HERE. THAT IS WHAT WAS SAID IN THE STATUTORY MANDATE THAT YOU ARE NOW POINTING OUT? THE STATUTE SAID YOU ARE TO DO A, B AND C. AND HERE WE HAVE THE RULES NOW THAT THEY HAVE DONE, AS A RESULT OF THAT, AND THEY DON'T DO B AND C. THEY MIGHT DO A, BUT THEY DON'T DO B AND C, SO WHERE, FOR INSTANCE, IS IT IN THE STATUTE THAT THEY HAVE TO ENACT RULES, WITH REFERENCE TO THE PRESERVATION, THE STORAGE AND THE TRANSPORTATION OF THE SAMPLES? WHAT PART OF THE RULE OR THE STATUTE SAYS THAT THE DEPARTMENT HAS TO ENACT A RULE DEALING WITH THAT SPECIFIC ASPECT?

YOUR HONOR, IT IS NOT SPECIFICALLY LAID OUT ON THE SPECIFIC ISSUES OF STORAGE, PRESERVATION AND TRANSPORTATION. BUT THE RULES INITIALLY WERE -- STEMMED FROM THE STATUTORY MANDATE THAT CAME FROM THE IMPLIED CONSENT STATUTE, THAT THE FDLE RULE MADE, WITH RESPECT TO PROCEDURES THAT WOULD ASSURE THE RELIABILITY FACTOR OF A BLOOD TEST THAT WOULD ALLOW THE STATE THE EXTREME POSITION OF HAVING A PREASSUMPTION OF IMPAIRMENT. MY POSITION, YOUR HONOR, THE DISTRICT COURT'S POSITION, AND I BELIEVE THIS WAS THE INITIAL IMP TEST TUS OF THE -- IMPETUS OF THE TRIAL COURT, THAT IT DOES, IN FACT, LAY OUT CERTAIN REQUIREMENTS THAT THE TAKING OF BLOOD OR THAT THE RESULTS MUST BE TAKEN BY, BUT IT LEAVES GAPS, IN TERMS OF OTHER ASPECTS, AND THIS IS WHERE I WOULD DRAW TO JUDGE WOLF'S DISSENTING OPINION, BECAUSE I KNOW THAT IT IS A QUESTION THAT THE COURT HAD ON THAT. I THINK JUDGE WROF SPECIFICALLY AGREED -- JUDGE WOLF SPECIFICALLY AGREED THAT IT WOULD BE BETTER PUBLIC POLICY. THAT IS IN HIS DISSENTING OPINION, AND I THINK REFLECTED BY THAT STATEMENT FROM JUDGE WOLF, THAT THERE BE AN ATTEMPT AND CERTAINLY WE ARE NOT SUGGESTING THAT THERE BE A HYPERTECHNICAL READING, BUT NOT EVERY ASPECT LAID OUT, BUT THERE HAS BEEN LANGUAGE, AND I BELIEVE IN JUDGE WOLF'S DISSENTING OPINION, THAT IT WOULD BE BURDENSOME OR OVERWHELMING TO CREATE A RULE-MAKING BASIS HERE, AND IT IS COMMON KNOWLEDGE THAT THERE ARE CERTAIN TECHNIQUES THAT EVERYONE UNDERSTANDS, WITH REGARDS TO THE RULES, AND I UNDERSTAND THAT THOSE RULES ARE INHERENT, BUT I UNDERSTAND THAT THEY ARE NOT PROTECTED OR PUT FORTH IN A RULE, AS SPECIFICALLY MANDATED BY STATUTE, WHICH INSISTS AND REQUIRES RELIABILITY, IN ORDER TO GET A

PRESUMES --

DON'T YOU GET AN ESSENTIAL OF A CIRCUIT COURT RULING THAT THERE IS AN EVIDENTIARY HEARING AND THEY HAVE EVIDENCE ON BOTH SIDES, AND THEY EXPRESS OPINIONS ABOUT WHAT OUGHT TO BE IN A COMPREHENSIVE SET OF RULES GOVERNING THIS ISSUE, AND THE CIRCUIT COURT ENDS UP SAYING I AGREE WITH THE STATE'S EXPERT ABOUT THIS AND THE DEFENSE EXPERT ABOUT THIS, AND THEREFORE I WILL DRAFT A SET OF RULES FOR THE STATE, AND THERE IS NOTHING IN THE STATUTE THAT INDICATES THAT THAT IS REALLY WHAT THE LEGISLATURE CONTEMPLATED, IS IT? THAT IS WHEN JUDGE WEF WOLF TALKS ABOUT SPECIFIC POLICY, PROBABLY THEY HAVEN'T DONE THAT IN THIS PARTICULAR CASE.

I THINK THAT, YOUR HONOR, THE LEGISLATIVE MANDATE, AND, AGAIN, RELIABILITY, I THINK, IS A CRUCIAL CONCEPT HERE THAT WE ALL UNDERSTAND. IT WAS A CRUCIAL CONCEPT THAT WAS ADDRESSED IN ROBERTSON. IT WAS ADDRESSED IN BENDER, AS ACCEPTED IN ROBERTSON.

IT WAS ADDRESSED IN BENDER, AND IN ESSENTIAL WE SAID, YEAH, THERE IS A PROBLEM HERE, THAT EVERYBODY PRETTY MUCH CONCEDES, BUT WE ARE NOT GOING TO SAY THAT THAT PROBLEM, THEN, DEPRIVES THE STATE, IF THEY OTHERWISE COMPLY WITH THE RULES THEY DID DON'T, OF THESE PRESUMPTIONS. DEAL WITH THAT ON AN INDIVIDUAL CASE BASIS.

I THINK THAT IS WHAT HAPPENED IN THIS CASE, YOUR HONOR. I THINK THE TRIAL COURT, WHO HEARD THE EVIDENCE AS TO WHAT THE EXPERTS WOULD TESTIFY AS TO WHAT TESTING PROCEDURES MAY BE DEFICIENT WITH RESPECT TO RELIABILITY.

THE TRIAL COURT -- THERE WAS NOT EVIDENCE PRESENTED AS TO THE RELIABILITY OR WHAT HAPPENED IN THIS PARTICULAR CASE.

NOT THIS PARTICULAR CASE.

WHY SHOULDN'T THAT BE THE RELIEF THAT YOUR CLIENT IS ENTITLED TO? THAT IF, IN THIS PARTICULAR CASE, THAT YOU CAN DEMONSTRATE, FOR INSTANCE, THAT THERE WAS NO REFRIGERATION OR THAT THERE WASN'T A CHEMICAL ADDED IN ORDER TO KEEP THIS STUFF GOOD FOR A LONG ENOUGH PERIOD OF TIME, AS TO WHEN THE TESTING WAS DONE, THAT IF YOU CAN SO DEMONSTRATE THAT THE SAMPLE HERE AND THAT THE TESTING THAT WAS DONE OF IT IS INADEQUATE, YOU CAN EITHER KEEP IT OUT OF EVIDENCE OR THAT YOU HAVE IMPEACHED IT, YOU KNOW, IN FRONT OF A JUDGE OR JURY. WHAT -- THAT WAS THE RELIEF THAT THIS COURT SUGGESTED WOULD BE AVAILABLE IN BENDER, RIGHT?

YES, YOUR HONOR.

WHY SHOULDN'T THE SAME OUTCOME OCCUR HERE?

YOUR HONOR MIGHT BE SURPRISED TO FIND THAT I AM ABOUT TO AGREE WITH YOU. THAT IS EXACTLY THE RELIEF THAT THE TRIAL JUDGE, IN THIS CASE, ESSENTIALLY GAVE, BY SAYING THAT THE DEFENSE IN THE MILES CASE, ON THE TRIAL COURT LEVEL, WOULD BE ALLOWED, PURSUANT TO THE ROBERTSON THREE-PART PREDICATE TO ATTACK THE CREDIBILITY OF THE RESULTS, TO ATTACK WHETHER OR NOT THERE MAY HAVE BEEN A TEMPERATURE RISE OR DECREASE, WHICH COULD HAVE AFFECTED THE ALCOHOL LEVEL. THE TRIAL COURT IS ALLOWING, UNDER THE ROBERTSON RATIONALE, DEFENSE TO DO THAT AT THE TRIAL COURT LEVEL, BUT I THINK, FOR PURPOSES OF LOOKING AT THE CERTIFIED QUESTION BEFORE THIS COURT TODAY, AS TO WHETHER THAT STATUTORY PRESUMPTION SHOULD ATTACH, IN LIGHT OF A ROBERTSON PREDICATE ANALYSIS ONLY, I THINK THAT IS THE QUESTION THAT I AM SEEKING TO GET TO RIGHT NOW, IF I CAN WITH THIS, AND THAT IS THAT THE STATUTE, AGAIN, AND I AM DRAWING BACK ON THE IMPLIED CONSENT STATUTES, WHERE THEY DISCUSS RELIABILITY, LOOKING AT THE STATE BEING ABLE TO RELY ON A PRESUMPTION OF IMPAIRMENT, IN ORDER TO

ALLEVIATE THE NEED OF PROVING A CRUCIAL ELEMENT OF DUI BEYOND A REASONABLE DOUBT, WHICH GOES ALL THE WAY BACK TO OUR SUPREME COURT AND IN RE WINSET, THE STATUTE SAYS THAT THERE BE RELIABILITY IN ORDER TO GET THE PRESUMPTION. IF, ON A TRIAL COURT LEVEL, THE ROBERTSON MED PRED CAT IS NOW BEING USED AND SAYS THAT YOU ARE ALLOWED TO DO THAT, COUNSEL, BECAUSE WE HAVE SATISFIED THAT THE COURT DOES NOT REQUIRE DUE PROCESS REQUIREMENTS, OUR POSITION IS THAT IT SHOULD BE ANSWERED NO, BECAUSE --

I AM -- YOU JUST STATED THAT, BECAUSE THE RULE DOESN'T COMPLY WITH DUE PROCESS, SO -- WITH DUE PROCESS, ARE YOU SAYING NOW THAT THE COURT DIDN'T FIND THAT THE RULE COMPLIED WITH STATUTORY MANDATE AND NUMBER TWO, THAT IT DIDN'T COMPLY WITH DUE PROCESS.

ESSENTIALLY, YOUR HONOR, THE TRIAL COURT FOUND THAT. ANOTHER TRIAL COURT FOUND THAT THERE WAS NO COMPLIANCE WITH THE STATUTE OR DUE PROCESS.

THE TRIAL COURT DID NOT SAY, AND THE TRIAL COURT, LET ME BE VERY CLEAR ON THIS, THE TRIAL COURT DID NOT, IN ANY WAY, DECLARE THAT THE STATUTE OR THE IMPLIED STATUTES, WERE UNCONSTITUTIONAL. THEY DID NOT MAKE THAT FINDING SOLVE. WHAT THEY FOUND OR WHAT THE TRIAL COURT RULING FOUND WAS THAT THE FDLE RULE THAT WAS BEING USED FOR ESTABLISHING THE RELIABILITY OF RESULTS, THAT THAT RULE WAS DEFICIENT, ON DUE PROCESS GROUNDS, IN THAT IT DID NOT GIVE THE ADEQUATE ASSURANCES. THERE IS A DISTINCTION THERE, AND THE TRIAL COURT DID NOT AND WE ARE NOT CONTENDING TODAY THAT THE TRIAL COURT FOUND THE IMPLIED STATUTES ARE UNCONSTITUTIONAL AND IN FACT SPECIFICALLY IN REGARD TO SECTION 192, IT VERY CLEARLY LAYS OUT THE OBLIGATION OF FDLE IN THIS REALM.

THERE FOR THE IN PENNSYLVANIA-THE IMPACT OF THIS CASE WOULD ONLY BE IN YOUR -- THERE FOR THE IMPACT IN THIS CASE WOULD ONLY BE IN YOUR PARTICULAR CASE? BECAUSE ARE YOU SAYING THAT THE EVIDENCE THAT YOU PRESENTED REBUTTED THE PRESUMPTION OF THE STATUTE IN YOUR PARTICULAR CASE, LIKE FOOTNOTE SIX OF ROBERTSON, WHICH SAYS THAT THE DEFENSE MIGHT CHALLENGE THE REGULATIONS AS BEING SCIENTIFICALLY UNSOUND, AND THAT BURDEN WOULD REST ON THE DEFENSE. THAT IS WHAT YOU PROVED IN THIS CASE, AND THAT IS WHY THE TRIAL COURT IS NOW REQUIRING THE STATE TO GO FORWARD TO ESTABLISH RELIABILITY, INDEPENDENTLY OF THE STATUTE?

I THINK THE TRIAL COURT IS REQUIRING THE STATE TO PROVE RELIABILITY OF THE RESULTS, INDEPENDENT OF THE PRESUMPTION.

AND THAT IS BECAUSE -- THAT IS, MAYBE, SO WE UNDERSTAND THAT, THAT IS BECAUSE OF EVIDENCE YOU PUT ON BY YOUR EXPERT WIT, THAT YOU STATE -- WITNESS, THAT YOU STATE WHERE YOU PUT FORTH YOUR BURDEN TO REBUT THE PRESUMPTION OF RELIABILITY?

THE EVIDENCE WAS PUT -- NO, YOUR HONOR. THE EVIDENCE IS PUT ON BEFORE THE TRIAL COURT, AND IT WAS TO THE EFFICACY, IF YOU WILL, OF THE FDLE RULE, WITH RESPECT TO THE RELIABILITY OF THE TEST RESULTS, AND THE EXPERT TESTIMONY, BOTH DEFENSE AND PROSECUTION EXPERT WITNESSES AT THAT TIME FOUND, AND THERE WAS SOME COMMON GROUND, WHICH, AGAIN, WAS PART OF THE REASON, I BELIEVE, IN THE OPINION OF THE TRIAL COURT, THERE WAS A COMMONALITY BETWEEN BOTH THE DEFENSE AND PLAINTIFF OR THE RULE, ITSELF, MUST BE LEFT TO TERMS OF ESTABLISHING RELIABILITY.

YOU ARE CONCERNED THAT IT NATURALLY FOLLOWS THAT THERE HAS TO BE AN EVIDENTIARY BASIS FOR THIS EVIDENCE TO COME IN, AND BY REASON OF THAT, YOU DON'T GET THE PRESUMPTION OF THE IMPLIED CONSENT LAW.

CORRECT, YOUR HONOR. THAT IS WHAT THE TRIAL COURT RULED.



RIGHT. AND BECAUSE -- AND IT IS REALLY BECAUSE OF THE WHOLE, IN NOT HAVING A RULE BASIS FOR THE ADMISSIBILITY AND HAVING TO GO TO THE EVIDENTIARY, THAT WHAT YOU ARE REALLY RELYING UPON HIS A ROBERTSON TYPE OF ANALYSIS.

NO, YOUR HONOR. WHAT WE ARE RELYING ON, THERE IS A ROBERTSON ANALYSIS THAT THE TRIAL COURT HAS NOW STATED WILL BE REQUIRED IN ORDER TO ESTABLISH THE RELIABILITY, BECAUSE THERE WAS A GAP IN WHAT IT PERCEIVED TO BE FUNDAMENTAL PROTECTIONS IN THE RULE FDLE --

BUT BECAUSE YOU HAVE TO GO TO THAT, WHAT I UNDERSTAND YOUR ARGUMENT TO BE, THEN YOU DON'T GET -- THE STATE DOESN'T GET THE PRESUMPTIONS OF THE STATUTE.

CORRECT, YOUR HONOR.

IT IS YOUR VIEW THAT THE STATE DOESN'T GET THE PRESUMPTION OF THE STATUTE, EVEN IF THEY DEMONSTRATE, IN THIS PARTICULAR CASE --

YES, SIR.

-- THAT THEY ADEQUATELY PRESERVED IT OR WHAT ARE THESE ISSUES, ANY OTHER ISSUES THAT YOU HAVE RAISED. IS THAT RIGHT?

YES, JUSTICE, GETTING TO THE POINT OF THE CERTIFIED QUESTION FROM THE FIRST DCA DARK, AND THAT IS BASED, AGAIN, IN LOOKING AT BENDER, ROBERTSON, AND EVEN IN MEHL, BECAUSE THE STATUTORY, AND IT IS LAID OUT IN THE IMPLIED CONSENT STATUTORY BODY, ITSELF, THAT THE PRESUMPTION THAT IS GIVEN, THE PRESUPPOSITION OF IMPAIRMENT, IS A STATUTE -- THE PRESUMPTION OF IMPAIRMENT, IS A STATUTORY CREATURE OF THE RELYIBILITY OF PROCEDURES, AND THE FUNDAMENTAL BASIS OF THAT IS RELIABILITY, THAT THE PRESUMPTION MUST BE BASED ON RELIABILITY. THE EXPERTS TESTIFIED, ON THE TRIAL COURT LEVEL, THAT THAT PARTICULAR REGULATION COULD NOT GIVE US THE ASSURANCE THAT --

YOU ARE SAYING TO TREAT IT AS IF THEY HAD REGULATIONS ONE, TWO AND THREE, BUT IT WAS DEMONSTRATED THAT THEY DIDN'T COMPLY WITH REGULATIONS ONE, TWO AND THREE.

NEW YORK CITY YOUR HONOR. I AM NOT ASKING THIS COURT TO READ INTO THE FDLE RULE, AND THE EXTREMELY -- BEING EXTREMELY COGNIZANT OF JUDGE WOLF'S OPINION WITH RESPECT TO WHAT MEHL DID OR DID NOT ALLOW, BECAUSE THAT IS AN INTERESTING CASE, WITH RESPECT TO THAT. I AM NOT ASKING THE COURT TO RULE MAKE. I THINK THAT THE COURT'S POSITION IN MEHL, WHERE IT LAID OUT A TIME PERIOD SPECIFIC, WHERE NO MORE PRESUMPTIONS WOULD BE ALLOWED, UNLESS THE RULES WERE CLARIFIED --

IN HE HAVE -- IN EFFECT, THOUGH, ISN'T THAT IS WHAT IS GOING ON HERE, BECAUSE IF WE APPROVE THAT, IN ORDER FOR THE STATE TO GET THE PRESUMESS THAT ARE PROVIDED FOR IN THE STATUTE, THEY WOULD HAVE TO HAVE THESE RULES THAT THE TRIAL COURT SAID WERE NECESSARY TO ESTABLISH RELIABILITY.

YES, YOUR HONOR.

IT IS SORT AFTER CATCH-22.

IT IS. AND I UNDERSTAND, INTERESTINGLY, I UNDERSTAND JUDGE WOLF'S DISSENTING OPINION. IT IS A DANGEROUS DISSENTING OPINION, IN MY VIEW, BECAUSE IT LESSENS -- AND I THINK IT UNDERMINES THE INTENT OF THE RULE, AND THE STATUTORY KRET YOUR OF -- CREATURE OF RELIABILITY.

BENDER DID THE SAME THING, DID IT NOT? I MEAN, BENDER SAID THERE IS A PROBLEM HERE. AND WE RECOGNIZE THERE IS A PROBLEM HERE, BUT ENVELOPES -- BUT NEVERTHELESS WE DON'T FIND THAT IT WAS MANDATED, YOU KNOW, TO MAKE AN EXPRESS PROVISION FOR THIS, AND THE STATE STILL CAN GET THE SAMPLES IN AND STILL CAN GET THE PRESUMPTION?

THAT'S CORRECT.

ISN'T THAT WHAT THEY DID?

UNDER BENDER, YOUR HONOR, THE COURT, IN ESSENCE, RULED THAT WAY. HOWEVER, THE IMPORTANT ASPECT OF BENDER, FOR PURPOSES OF ARGUMENT TODAY, IS THAT AGREE THAT THE COURT DID RULE WITH THE FIRST DCA, AND THAT IS THAT THE STATE IS NOT IN COMPLIANCE WITH THE MANDATORY STATUTES.

THEY FOUND THAT COMPLIANCE BY THE STATE IN THAT CASE, EVEN THOUGH IT LEFT OUT SOMETHING THAT THE COURT SAID WOULD BE IMPORTANT, WAS SUFFICIENT. DID WE NOT?

BUT WITH RESPECT TO THE CASE THAT IS BEFORE THE COURT TODAY, YOUR HONOR, I THINK RELIANCE UPON BENDER WARRANTED, IN THAT WE ARE SHOWING, AND THE TRIAL COURT HAS SHOWN THE FIRST DCA HAS AFFIRMED ON THAT ISSUE, THAT THERE WERE DEFICIENCIES IN THE RULE, ITSELF, THAT WOULD GIVE US RELIANCE ON BENDER, IN TERMS OF THERE NOT BEING ALLOWABLE PRESUMPTION.

YOU DON'T AGREE WITH JUDGE WOLF'S NALSZ OF BENDER?

-- ANALYSIS OF BENDER?

NO, I DO NOT, YOUR HONOR.

OKAY.

I THINK ONE OF THE PROBLEMS I HAVE WITH, AND NOT TO DELVE INTO THIS TOO MUCH, BUT I THINK, WITHOUT OVERESTIMATING THE IMPORTANCE OF THIS, BUT I THINK IT IS CRUCIAL TO THIS, AND THAT IS THAT SOME OF THE LANGUAGE IN JUDGE WOLF'S DISSENTING OPINION, I DO FIND TROUBLESOME, BECAUSE IT LESSENS THE ACCOUNTABILITY FOR RELIABILITY. HE TALKS ABOUT WHY HAVING EXPANSIVE -- WHY HAVE EXPANSIVE REGULATORY OBLIGATIONS OR RULE-MAKING OBLIGATIONS, WHEN THERE IS COMMON KNOWLEDGE THAT YOU DON'T OVER SHEET A BLOOD SAMPLE? -- OVERHEAT A BLOOD SAMPLE THAT IS NOT LAID OUT IN ANY RULE, AND VARIATION IN HIS TEMPERATURE, UP AND DOWN, IT WAS FOUND IN COURT, CAN IMPACT THE AMOUNT OF ALCOHOL THAT CAN BE DETECTED IN A SAMPLE.

JUST AS AWAY OF MORE CURIOSITY, BUT I THINK IT HAS SOME DIRECT BEARING HERE, DO WE KNOW, BASED ON THIS RECORD, WHETHER THE LACK OF REFRIGERATION, ASSUMING THAT DID OCCUR, WHAT EFFECT IT WOULD HAVE ON THE BLOOD ALCOHOL?

I BELIEVE THAT THERE WAS TESTIMONY THAT LACK OF REFRIGERATION, TO THE EXTENT THAT THERE WAS AN INCREASE OR DECREASE IN HEAT OR THAT IT WAS NOT KEPT WITHIN A TEMPERATURE RANGE, COULD WELL IMPACT --

WHICH WAY? WOULD IT HELP YOU OR HURT YOU?

I CAN'T ANSWER THAT QUESTION HONESTLY, YOUR HONOR.

ISN'T THAT SORT OF, WHEN WE ARE LOOKING AT THIS WHOLE THING, ISN'T THAT SORT OF AN IMPORTANT MISSING PIECE? IF, AS THE STATE SAYS, THE LACK OF PUTTING A PRESERVATIVE IN

ONLY HURTS THEM, AND YOU HAVE 14 DAYS HERE, AND THE WORST THAT WAS GOING TO HAPPEN IS THAT THE BLOOD WHOLE ALCOHOL CONTENT WAS -- BLOOD ALCOHOL CONTENT WAS GOING TO GO DOWN, WHY IS THAT SOMETHING THAT WE SHOULD PUT TO THE ADVANTAGE OF THE DEFENDANT?

BECAUSE THERE IS NOTHING CURRENTLY, YOUR HONOR, WHICH STATES THAT.

BUT DON'T YOU THINK, BUT WHY, SINCE YOU WERE -- HAD YOUR EXPERT THERE, IF IT WAS SOMETHING THAT, LIKE, FOR EXAMPLE, THE KNOWLEDGE ABOUT THE BLOOD ABSORPTION, IF THERE WAS SOMETHING TO BE HELPFUL TO SHOW, LISTEN, WHAT HAPPENS WITH LACK OF -- WITH, YOU KNOW, PRESERVED TEMPERATURE, IS THAT THE BLOOD ALCOHOL CONTENT GOES UP, THAT, THEN, WE HAVE GOT SOME SERIOUS PROBLEMS THERE, AS FAR AS YOUR CLIENT'S DUE PROCESS, BUT THE INTEGRITY OF THE SAMPLE JUST DETERIORATES, HOW DOES THAT -- THAT IS SOMETHING THAT YOU CAN ATTACK BEFORE THE JURY.

THAT IS CORRECT, YOUR HONOR, AND IT IS A DEFENSE STRATEGY, AND I OBVIOUSLY UNDERSTAND THE COURT'S POSITION ON THAT, BUT I THINK, GOING TO THE HEART OF YOUR HONOR'S QUESTION, I THINK IT, ALSO, STATES THAT WE DON'T KNOW WHAT IMPACT UP OR DOWN OR TEMPERATURE INCREASE --

WE DON'T BUT WE ARE NOT SCIENTISTS. CERTAINLY --

BUT THE FDLE, CERTAINLY, IN CREATING THESE RULES, YOUR HONOR, AND I SEE MY TIME HAS EXPIRED OR IS ABOUT TO EXPIRE, BUT IN CREATING THESE RULES, EXPERTS DO HAVE MINIONS ON THESE MATTERS. -- DO HAVE OPINIONS ON THESE MATTERS. IT WOULD NOT BE OVER BURDENSOME TO RULE MAKE THAT TEMPERATURES MUST BE KEPT WITHIN A CERTAIN VARYING NUMBER OF DEGREES OR IT MUST BE TESTED WITHIN A CERTAIN PERIOD OF TIME. WE ARE NOT ASKING FDLE REWRITING VOLUMES OF RULES. WE THINK THERE ARE SOME SAFEGUARDS THAT CAN CONCISELY GO AND TREAT THE STATE AND COURT'S CONCERNS IN THIS MATTER.

IN YOUR OPINION, THE INTEGRITY OF THE TEST IS AFFECTED BY THE LACK OF REFRIGERATION, IS THERE -- ARE THEY ALL UNIFORM ON THAT? DO THEY ALL AGREE THAT IT WOULD BE A FACTOR, THE EXPERTS?

I THINK, YOUR HONOR, THAT THERE IS UNIFORM AGREEMENT THAT TEMPERATURE VARIATION CAN IMPACT A SAMPLE'S PRESERVATION. YES.

THANK YOU. REBUTTAL?

THANK YOU, YOUR HONOR.

MR. WHITE, DO WE NEED TO ANSWER THE PROPOSED QUESTION IN JUDGE WOLF'S ACCIDENT? IN ORDER -- IN JUDGE WOLF AS DISSENT, INORD ---DISSENT, IN ORDER TO GET TO GET TO THE ACTUAL QUESTION THAT IS BEFORE THE COURT?

YES, YOUR HONOR. THE PREMISE OF THE CERTIFIED QUESTION IS WHETHER OR NOT THE RULES ARE ADEQUATE. THE CERTIFIED QUESTION PRESUPPOSES THAT THE RULES ARE SUBSTANTIALLY DEFICIENT, THAT IS TO VIOLATE THE CORE POLICIES OF THE STATUTE AND/OR DUE PROCESS. SO THAT IS THE PREMISE FOR THE CERTIFIED QUESTION.

SO, THEN, IF WE ANSWER THE PROPOSED QUESTION BY JUDGE WOLF, IN THE NEGATIVE, THEN WHAT DO WE DO WITH THE ACTUAL QUESTION THAT IS BEFORE US?

IF, IN FACT, OF COURSE, THE RULES ARE ADEQUATE, GIVEN THE WHOLE BODY OF LAW, THEN, OF COURSE, WE DON'T REACHED REACH THE CERTAIN -- WE DON'T REACH THE CERTIFIED QUESTION.

IF, IN FACT, THE RULES ARE SUFFICIENT, THEN WE HAVE TO ADDRESS THE CERTIFIED QUESTION, AS TO WHETHER OR NOT THE STATE ENTITLED TO INFERENCE AS TO IF IT MET THE RULES AND IF IT ESTABLISHES THREE-PRONGED PRECEDENT OF BENDER AND ROBERTSON. AND THE ANSWER TO THAT QUESTION WOULD BE, YES, THE STATE DID PROVIDE INFERENCE --

BUT CONTRARY TO THE, WHETHER THE STATE HAS TO ENACT THESE PARTICULAR RULES, BASED ON EVIDENTIARY HEARING, THROUGHOUT ROBERTSON, WE MADE IT PRETTY CLEAR THAT THE COURT COULD NOT INSTRUCT THE JURY ON THE PRESUMPTIONS AND THAT THE PRESUMPTIONS WOULD NOT BE APPLICABLE, IF YOU HAVE SOMETHING LESS THAN COMPLIANCE WITH THE STATUTORY MANDATE AND THE RULES THAT ARE ENACTED TO FOLLOW THOSE. RIGHT?

IF I RECALL ROBERTSON, THOUGH, YOUR HONOR, IT CONCERNED SOMETHING THAT WAS EXPLICITLY MANDATED IN THE STATUTE THAT THAT PARTICULAR CASE DID NOT COMPLY WITH.

THERE MUST BE FOUR OR FIVE OR SIX EXPRESS STATEMENTS, THOUGH, IN ROBERTSON, THAT THE STATE WOULD NOT BE ENTITLED TO THE PRESUMPTION, IF THEY DID NOT COMPLY WITH THE STATUTE OR THE RULES. IS THERE NOT? AM I READING ROBERTSON?

UNDER THE SITUATION OF ROBERTSON, YES, YOUR HONOR, BUT THE STATE WOULD CONTEND THAT THAT CONCERNS, AGAIN, A CORE POLICY, IN THE SENSE THAT THE STATUTE IS VERY EXPLICIT AS TO THE PERSON HAS TO BE PERMITTED. YOU DON'T HAVE THAT HERE. INSTEAD, IN FACT, YOU HAVE A GENERAL MANDATE TO DO REGULATIONS, PROVIDE REGULATIONS REGARDING THE TESTING AND THE PERMITTING AND SO ON, AND WE DO HAVE, IN FACT, ALL KINDS OF SAFEGUARDS THAT ARE NOT MANDATED BY THE STATUTE, THAT WE STILL HAVE IN PLACE.

WOULD YOU COME BACK AND CHARACTERIZE THE TRIAL COURT'S RULING, AGAIN, ABOUT WHETHER IT WAS NOT, THE RULES WERE NOT IN COMPLIANCE WITH THE STATUTE, OR WHETHER THE -- THEY ARE NOT IN COMPLIANCE WITH DUE PROCESS?

THE TRIAL COURT MENTIONS BOTH, YOUR HONOR. CORE POLLS. I HONESTLY DON'T -- CORE POLICIES. I HONESTLY DON'T KNOW WHETHER THE DUE PROCESS VIOLATION, ACCORDING TO THE TRIAL COURT, IS DUE TO THE FACT THAT IT VIOLATED AND DID NOT ADEQUATELY IMPLEMENT THE CORE POLICIES, OR WHETHER THE CORE POLICIES MERELY STAND ON THEIR OWN, WITH REGARD TO LEGISLATIVE INTENT.

IS THERE ANYTHING IN THIS CASE THAT SHOWS INTENT THAT THIS SAMPLE OR WHATEVER WAS NOT PROPERLY PRESERVED OR WHATEVER?

NO, YOUR HONOR. IN FACT THE STATE CHEMIST TESTIFIED THAT THE BLOOD WAS FREE FLOWING IN THIS CASE, SO ALL INDICATIONS ARE THAT, IN FACT, THIS BLOOD WAS NOT CONTAMINATED IN THIS PARTICULAR CASE. VERY BRIEFLY, IF I COULD, REGARDING THE CORE POLICIES ARGUMENT, OF COURSE BENDER DEALS WITH CORE POLICIES, AND IT DOESN'T TALK ANYTHING ABOUT CHAIN OF CUSTODY OR TEMPERATURE OR WHATEVER. IT JUST SIMPLY SAYS, AND THIS IS BASED ON THE PREDECESSOR STATUTE, THAT, WHEN THE STATE MEETS APPROVED ALCOHOL TEST METHODS BY A PROPERLY LICENSED PRART OR, THAT THAT IS GOOD ENOUGH TO IN -- OPERATOR, THAT THAT IS GOOD ENOUGH TO INVOKE THE STATUTE. IT DOESN'T SAY ANYTHING -- AND THIS IS BASED ON STATUTORY LANGUAGE. 396(4)(5), WHICH DEALS WITH THE ACTIONS BY THE CHEMIST, IT DOESN'T TALK ABOUT CUSTODY AT ALL, AND WHAT IS ADMISSIBLE, IN TERMS OF INTERPRETING LEGISLATIVE INTENT, AND FINALLY PAREN TWO OF THAT STATUTE TALKS ABOUT "OTHERWISE ADMISSIBLE", THE LEGISLATURE DOES RECOGNIZE THAT WE LOOK TO THE RULES, ALSO, SO CORE POLICIES DON'T HAVE TO HAVE EVERYTHING SELF-CONTAINED IN THE RULES.

THANK YOU. THANK YOU, MR. KING. THANK YOU FOR RESOLUTION OF THIS CASE. WE WILL BE IN RECESS UNTIL IN THE MORNING. BAILIFF: PLEASE RISE.

