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IN THE SUPREME COURT OF FLORIDA

MICHAEL J. VEILLEUX,

Petitioner,

v. Case No. 80,767

STATE OF FLORIDA,

Respondent.

_______________________________/

APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN A. BAKER
Assistant Attorney General
Florida Bar 0365645
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR RESPONDENT

/hb

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STATEMENT OF THE CASE AND FACTS

Petitioner has taken a breath test on an Intoxilyzer 5000 breath testing instrument and have been charged with DUI and/or driving with a blood alcohol concentration higher than .10. Petitioner brought a Motion to Suppress based upon the failure of the HRS Rules governing breath testing to provide sufficient guidelines addressing the accuracy and reliability of annual and monthly maintenance procedures for the Intoxilyzer 5000. (R 217-219) A hearing was held on June 27, 1991 before the Honorable Barbara Briggs, County Judge, in and for the 17th Judicial Circuit in Sarasota County, Florida. The following testimony was adduced at the hearing.

Bernard Justice was called, by the State, to defend the HRS rules and their application to Intoxilyzer 5000 breath testing. (R 9, 10). Mr. Justice is an Alcohol Breath Testing Inspector who conducts inspections on the breath testing instruments in the Sarasota area. (R 10, 11). He testified that form number 1514 was attached to the administrative rules governing breath testing and was incorporated within the rules in the 1982 version. (R 12). The HRS rules in question are commonly referred to as 10D42 Rules (hereinafter simply called "rules"). (R 12). Form 1514 is commonly referred to as the monthly maintenance form which is referred to in the subsections 10D42 of the rules. (R 13). Justice further testified that in 1986 HRS began to employ another 1514 form which is used in Sarasota County. (R 14, 15). The 1986 form 1514 was not promulgated officially by HRS. (R

16). However, the only difference between the forms is that the 1986 version sports an HRS logo and has blank spaces meant to be used for running an acetone test on the Intoxilyzer 5000. (R 17, 18, 19). Even the 1990 promulgation of HRS rules for the Intoxilyzer 5000 referred back to the 1982 form 1514. (R 19, 20). Justice further opined that compliance with the 1986 version of 1514 would exceed the requirements of the 1982 form (R 26).

Subsection .022 of the rules covers the initial testing an Intoxilyzer must pass before it is put in use in the State of Florida. (R 29). It requires the most exhaustive procedure. (R 29). Justice testified that the U.S. Department of Transportation must first test the instrument before HRS will consider approving the instrument. (R 30). Under .022, HRS tests the Intoxilyzer for accuracy. (R 32). .022 requires certain levels of accuracy to be achieved, within specified tolerances, for different levels of alcohol concentration. (R 33, 34). Additionally, accurate tests must be reproduced 50 times, but HRS adds in another 25 tests which the rules do not require. (R 35). Fifty further tests are added at the critical .100 level as well as for acetone (R 36).

Mr. Justice was further questioned about the monthly and annual maintenance procedures. Annual inspections are based upon a "wet bath simulator" which is put into the Intoxilyzer which is mixed to a known value. (R 51). Justice testified that it is his practice to employ the same allowable accuracy variances as

defined in .022. (R 52, 53). The instrument is examined for reproducibility a minimum of 25 times. (R 62).

With respect to monthly maintenance procedures, Justice reviews the records of the various agencies he visits. He tries to review every one he can. (R 54). The monthly maintenance procedures are performed in accordance with form 1514. (R 62). Monthly tests for accuracy are reproduced 3 times. (R 64, 65). The 1986 form requires more than three accurately reproduced tests. (R 66). Each month the Intoxilyzer is checked for accuracy in accordance with the HRS rules (under .022). (R 67). Monthly maintenance routines are not established by the rules but were formulated at staff meetings with the scientific director in charge of implied consent for HRS. (R 69, 70). Generally, all the annual inspectors would use the same tolerance standards throughout the state, in coordination with the scientific director. (R 81). Different inspectors do not have looser standards for testing. (R 87). When annual inspections are performed, a minimum of 25 tests are run. (R 92). The individuals who mix the known alcohol samples for testing are trained and certified in that regard (R 100). Just because the rules do not require annual or monthly testing to be performed to a specific tolerance does not mean that the test results are inaccurate. (R 103). Mr. Justice even helped write the new August 1991 HRS rules. (R 90).

Justice admitted that there are no rules, promulgated after a public hearing, that apply to the standards for accuracy and reliability of annual and monthly maintenance checks. (R 69-96).

On August 1, 1991, the trial court issued an Amended Order suppressing the breath test results by finding that HRS has failed to comply with the dictates of Section 316.1932 by not promulgating rules governing the standards for accuracy and reliability for both annual and monthly maintenance checks of the Intoxilyzer 5000. As a result, the following three questions were certified to the District Court as being of great public importance:

> DOES THE COUNTY COURT HAVE JURISDICATION TO HEAR THE ISSUES PRESENTED IN THE DEFENDANT'S MOTION IN LIMINE CONCERNING QUESTIONS OF ADMINISTRATIVE RULES ANDD PROCEDURES?
>
> DOES THE FAILURE OF HRS TO PROMULGATE A RULE, AFTER PUBLIC HEARING, WHICH COULD PROVIDE A TEST FOR RELIABILITY AT THE MONTHLY AND ANNUAL INSPECTIONS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL?
>
> WHEN A DEFENDANT CONSENTS TO AN APPROVED CHEMICAL TEST, BUT IS GIVEN A NON-APPROVED TEST, MAY THE STATE INTRODUCE EVIDENCE OF THE NON-APPROVED TEST BY ESTABLISHING THE TRADITIONAL PREDICATE FOR THE INTRODUCTION INTO EVIDENCE OF SCIENTIFIC TESTS?

On August 26, 1992, the Second District court of Appeal issued its opinion in State v. Berger, 605 So. 2d (Fla. 2d DCA 1992). Therein, the following three questions were certified to this Court as being ones of great public importance:

> I. DOES THE COUNTY COURT HAVE SUBJECT MATTER JURISDICTION? MUST THE APPELLEES SEEK ADMINISTRATIVE RELIEF PRIOR TO OBTAINING JUDICIAL DETERMINATION OF THEIR CLAIMS?
>
> II. DOES THE FAILURE OF HRS TO PROMULGATE A RULE, AFTER PUBLIC HEARING, WHICH COULD PROVIDE A TEST FOR RELIABILITY AT THE MONTHLY

AND ANNUAL INSPECTIONS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL?

III. WHEN A DEFENDANT CONSENTS TO AN APPROVED CHEMICAL TEST, BUT IS GIVEN A NONAPPROVED TEST, MAY THE STATE INTRODUCE EVIDENCE OF THE NONAPPROVED TEST BY ESTABLISHING THE TRADITIONAL PREDICATE FOR THE INTRODUCTION INTO EVIDENCE OF SCIENTIFIC EVIDENCE?

Respondent, the State of Florida, now submits the following in response to Petitioner's Initial Brief.

SUMMARY OF THE ARGUMENT

The county court was without jurisdiction to hear this issue because it deals with the sufficiency of administrative rules. Common notions of administrative law dictate that challenges to rules be first addressed to the administrative body and then to the district courts of appeal. Such promotes judicial economy and does not deprive Petitioenr of his right to a speedy trial. Merely labeling the HRS rules "procedural" does not mean that the county court has subject matter jurisdiction sufficient to pass upon their adequacy.

No showing was ever made that law enforcement failed to follow HRS rules. Noncompliance with the rules is the only way a defendant can argue that the resulting breath test cannot be guaranteed as accurate under the abbreviated predicates authorized by statute. In any event, decisional law allows for the introduction of the contested breath test results under the newly revised August 1991 HRS rules.

Very simply, courts have long held that scientific tests can still be introduced if they meet traditional predicates for accuracy, reliability, and acceptability in the scientific community. That HRS may not have promulgated certain rules does not mean that Appellee's took a "non-approved" test that can never be proven accurate a result of a lack of rule.

The trial court further erred by finding that HRS has not met the statutory mandate of Section 316.1932. Inasmuch as the statutes does not require annual or monthly inspections, any HRS

practices aimed at such sufficiently meet and exceed the requirements of the statute.

ARGUMENT

ISSUE I

THE COUNTY COURT WAS NOT THE PROPER FORUM BECAUSE THE COUNTY COURT WAS WITHOUT SUBJECT MATTER JURISDICTION. LACK OF JURISDICTION ASIDE, THE APPELLEE'S MUST SEEK ADMINISTRATIVE RELIEF PRIOR TO OBTAINING JUDICIAL DETERMINATION OF THEIR CLAIMS. (CERTIFIED QUESTION RESTATED)

The state constitution provides that "[t]he county courts shall exercise the jurisdiction prescribed by general law." Art. V §§6(b), Fla. Const. The constitution further specifies the jurisdictions of the county courts with more particularity under Article V, Section 20(c)(4). Neither section contains authority under which the county court could have properly considered the validity of the H.R.S. Rules. Thus, the county courts do not have constitutionally authorized subject matter jurisdiction to entertain challenges to the validity of administrative rules.

Statutory jurisdiction for judicial review of administrative actions is provided under the Administrative Procedure Act, ch. 120, Fla. Stat. (Supp. 1990). The required preliminary administrative steps will be detailed in the next section under this point on appeal. The only courts which have jurisdiction under the act to review administrative agency actions are the supreme court, "the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides" §§120.68(2), and under very limited circumstances, the circuit courts are invested with power to act under §§120.73.

The county courts, however, are not invested with jurisdiction in chapter 120 or under any other statutory provision to entertain challenges to administrative actions under any circumstances. *See also* §§34, Fla. Stat. (1989).

The county court below made no particular findings with respect to its subject matter jurisdiction. Nonetheless, the court never actually passed upon the validity of the existing rules. Rather, the court accepted the rules as they are and decided that they were inadequate to ensure reliability and accuracy to a point sufficient to do away with traditional predicates. Thus, like ruling on an evidentiary issue, it necessarily determined that any question concerning the application of the rules is a procedural matter within the province of its jurisdiction.

The State does not challenge the conclusion that procedural aspects of the evidence code are properly considered by the county courts. However, no decision holds that question's concerning the sufficiency of the HRS rules themselves is procedural in nature.

> Procedural law . . . has been described as the legal machinery by which substantive law is made effective. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer.

Julian v. Lee, 473 So.2d 736, 738 (Fla. 5th DCA 1985).

The procedural aspect encompasses the actions of the court used to consider a claim that is properly before it, but procedural

law does *not* serve to invest a court with jurisdiction. The claim itself, on the other hand, is substantive. The creation of the H.R.S. rules, their definitions, and their affect on Petitioner constitute the substantive claims advanced below. Further, the attendant rights of the Petitioner is regulated by the requirement that administrative remedies be sought prior to obtaining judicial review (more detailed discussion of this issue *infra*). The supreme court establishes procedure, but "substantive law [is] the sole responsibility of the legislature" In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979).

It may be argued that a defendant has a right during the course of his criminal prosecution to challenge, under the due process clause, the validity or sufficiency of a statue or rule he is charged with violating. In State v. Cumming, 365 So.2d 153 (Fla. 1978), the defendant challenged the rules under which he had directly been charged. The instant Appellee's, on the other hand, were not charged with violating H.R.S. rules. Though it has been argued that there is no significant difference between the right to challenge a rule which is the basis of a criminal charge and a rule which allows the State to produce a major piece of evidence against a defendant, due process does not necessarily allow Petitioner to challenge the rules in the trial court.

"The fundamental requirements of due process are satisfied by reasonable opportunity to be heard." Florida Public Service Commission v. Triple "A" Enterprises, Inc., 387 So.2d 940, 943 (Fla. 1980) (citation omitted); see also Fuentes v. Shevin, 407

U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972); Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 (1990). Defendants have a reasonable opportunity to be heard through the administrative process. Although due process guarantees defendants a right to have their claims heard, it does not guarantee a particular forum. "[D]ue process is met if one adequate method of judicial review of the orders of administrative agencies is set up and . . . such method may be made exclusive by statute." Bath Club, Inc. v. Dade County, 94 So.2d 110, 113-114 (Fla. 1981) (citations omitted). This is precisely what is provided under the Administrative Procedure Act, chapter 120, Fla. Stat. (1989).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

It has long been established that "where an administrative remedy is provided by statue, relief *must* be sought by exhausting this remedy before the court will act." Halifax Area Council on Alcoholism v. City of Daytona Beach, 385 So.2d 184, 186 (Fla. 5th DCA 1980) (emphasis added) (citations omitted); *see also* Brooks v. School Board of Brevard County, 382 So.2d 422 (Fla. 5th DCA 1980); Orange County, Florida v. Game and Fresh Water Fish Commission, 397 So.2d 411 (Fla. 5th DCA 1981); Criterion Insurance Co. v. State of Florida, Department of Insurance, 458 So.2d 22 (Fla. 1st DCA 1984); Gulf Coast Home Health Services of Florida, Inc. v. State of Florida, Department of Health and Rehabilitative Services, 513 So.2d 704 (Fla. 1st DCA 1987); City of Deland v. Lowe, 544 So.2d 1165 (Fla. 5th DCA 1989). Moreover,

"[w]hen the facial unconstitutionality of an agency rule is the focus of an aggrieved party's constitutional claim, the administrative proceedings *must* be exhausted and the claim presented to the district court." Key Haven Associated Enterprises, Inc. v. Board of Trustees of the International Trust Fund et. al., 427 So.2d 153, 157 (Fla. 1982) (emphasis added).

Thus, the county court erred in considering the sufficiency of the HRS rules because exhaustion of administrative remedies before obtaining judicial review is mandatory.

Even if the county court had discretion to consider the challenge advanced below, its ruling represents an abuse of discretion. First of all, exhaustion of administrative remedies is in accordance with the provisions of the Administrative Procedure Act. Secondly, Petitioner would not be prejudiced by following the administrative course. Although the trials would be delayed beyond the usual 90 day period, the defendants are not forced to sacrifice their speedy trial rights. See Fla.R.Crim.P. 3.191(d)(2). Thirdly, it can hardly be agreed that the methods employed by the instant Petitioner is more judicially economical. While in a very narrow and short term view it would appear more economical, in the larger scheme of things it is anything but economical. There are 67 counties in the state. There are hundreds of sitting county court judges. When the total number of those judges is multiplied by the number of driving under the influence cases that involve breath testing machines, it is clear that thousands of challenges are possible

with possibly hundreds of differing conclusions reached by the assorted county court judges. A determination that judicial economy is served by proceeding in the instant fashion is refuted by the sheer number of cases which are now before the district courts as a result of various rulings.

It is far more judicially economical to require initial presentation of such claims to H.R.S. One consistent interpretation will be rendered by the agency for judicial evaluation. Assuming that judicial review is sought, at most there will be five different rationales because the legislature has limited judicial review of this sort to the district courts of appeal. The long term efficacy of requiring exhaustion of administrative remedies was explained this way:

> [A]gency review of a constitutional attack upon one of its rules affords the agency the opportunity of modifying its rule should it appear necessary or desirable to do so thus perhaps eliminating the need for further litigation or administrative hearing regarding the rule.

Occidental Chemical Agricultural Products, Inc. v. State of Florida, Department of Environmental Regulation, 501 So.2d 674, 678 (Fla. 1st DCA 1987d).

Petitioner will, no doubt, counter that procedures for monthly and annual checks for testing of the intoxilyzers have statewide application and thus meet the definition of a "rule" as that term is defined in Section 120.52.16, Florida Statutes, and Department of Transportation v. Blackhawk Quarry Co., 528 So.2d 447 (Fla. 5th DCA), review denied, 536 So.2d 243 (Fla. 1988).

Accepting that as true, that still does not negate the necessity of first exhausting administrative procedures. In Occidental Chemical the court held that if a rule is deemed to be a statute the circuit court could exercise jurisdiction, but if it were deemed to be a typical agency rule then the circuit court could not exercise jurisdiction. Id., 677, citing Key Haven, supra. Dicta in the Key Haven case appears to have engendered some of the confusion regarding both the exhaustion issue and the jurisdictional issue. The court stated:

> We have expressly recognized that circuit courts have the power, in all circumstances to consider constitutional issues. Gulf Pines Memorial Park, Inc. v. Oakland Memorial Park, Inc., 361 So.2d 695 (Fla. 1978). However, we stated in Gulf Pines that, as a matter of judicial policy, "the circuit court should refrain from entertaining declaratory suits except in the most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no adequate remedy remains under Chapter 120." Id., at 169. Clearly, the determination of whether a particular controversy may be taken out of the administrative process and into a circuit court is a question of judicial policy and not a matter of jurisdiction.
>
> Key Haven, 156-157.

The issue in Key Haven was not jurisdictional because the circuit courts have jurisdiction to render declaratory judgments under §§120.73. Again, the county courts have no such jurisdiction. Moreover, even if there was a jurisdictional basis for the county court to proceed upon, it could not properly entertain the claims advanced below. As the above passage

reveals, such judicial relief is appropriate only "in the most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no adequate remedy remains available under Chapter 120". Id., 157. No showing of extraordinary circumstances was made below.

Nowhere can Petitioenr point to a decision wherein "judicial economy" is sufficient a consideration to avoid the exhaustion of administrative remedies requirement.

The order below contains an observation that HRS has not promulgated rules, at a public hearing, governing annual and monthly checks for the accuracy and reliability of the Intoxilyzer 5000 in violation of Section 316.1932(1)(f), Florida Statutes. While §§316.1932(1)(f), Fla. Stat. (1989), states that public hearing is required, this statute does not provide an exception to the requirement of exhaustion of administrative remedies. An express statement of legislative intent is provided in the Administrative Procedure Act:

> (1)(a) The intent of the Legislature in enacting this complete revision of chapter 120 is to make uniform the rulemaking and adjudicative procedures used by the administrative agencies of this state. To that end, it is the express intent of the Legislature that chapter 120 shall supercede all other provisions in the Florida Statutes, 1977, relating to rulemaking, agency orders, administrative adjudication, licensing procedure, or judicial review or enforcement of administrative action for agencies as defined herein to the extent such provisions conflict with chapter 120 . . .

§§120.72(1)(a), Fla. Stat. (1989) (emphasis added).

In sum, the first certified question should be answered negatively. The county court is not a proper forum because county courts have no constitutional or statutory jurisdiction to entertain challenges to administrative rules. Furthermore, even if county courts had jurisdiction, administrative remedies must first be exhausted before judicial review is appropriate.

ISSUE II

DOES THE FAILURE OF HRS TO PROMULGATE A RULE, AFTER PUBLIC HEARING, WHICH COULD PROVIDE A TEST FOR RELIABILITY AT THE MONTHLY AND ANNUAL INSPECTIONS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL?

Respondent relies on the succinct reasoning of the Second District on this issue as well as the citations of authority in support therein. Additionally, Respondent offers the following analysis.

It is important to sharply focus the issue implicated by the order of the county court. The court did NOT find that there was noncompliance with the HRS rules. Rather, it found that HRS has not duly promulgated rules governing the accuracy and reliability of the annual and monthly maintenance checks and, essentially, that it would be nice to have such rules. It also found that the existing procedures are insufficient and do not supply a uniform standard of such monthly and annual inspections. The court never found that law enforcement failed to comply with the existing rules or that the results themselves were rendered inaccurate.

Section 316.1934(2), Fla. Stat. (1989) provides in relevant part:

> Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that he was deprived of full possession of normal faculties, the results of any test

> administered in accordance with S.316.1932 or s.316.1933 and this section shall be admissible into evidence when otherwise admissible. .

The seminal case on this issue is State v. Bender, 382 So.2d 697 (Fla. 1980). In material part the opinion stated:

> When the prosecution presents testimony in evidence concerning motor vehicle driver intoxication which includes an approved alcohol test method by a properly licensed operator, the fact finder may presume that the test procedure is reliable, the operator is qualified, and the presumptive meaning of the test as set forth in section 322.262(2) is applicable. [See now §§316.1934, Fla. Stat. (1989).] The test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by its authority. Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979); State v. Wills, 359 So.2d 566 (Fla. 2d DCA 1978). The presumptions are rebuttable, and a defendant may in any proceeding attack the reliability of the testing procedures, the qualifications of the operator, and the standards establishing the zones of intoxicant levels. In addition, other competent evidence may be presented to rebut the presumptions concerning whether the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired.
> Id., 699.

Bender and its progency permit defendants to attack on a factual basis the admissibility of breath test results. That is, the finder of fact may determine whether or not there was "compliance with the statutory provisions and the administrative rules enacted by its authority." Id. For example, in State v. Flood, 523 So.2d 1180 (Fla. 5th DCA, 1988) the court upheld the

finding of the trial court that recertification of an altered Intoximeter 3000 (I 3000) Breathalyzer machine was necessary before evidence of the defendant's blood alcohol level obtained by the breathalyzer test was admissible. The court explained that "the trial court, confronted with conflicting evidence, could properly determine as a factual matter that the chemical breath tests were inadmissible because the substantially modified I-3000 machine was not approved by HRS." Id., 1182 (emphasis added).

Another example of a trial court properly determining on a factual basis that the state could not rely upon the evidentiary presumptions can be found in Donaldson v. State, 561 So.2d 648 (Fla. 4th DCA 1990), approved State v. Donaldson, 579 So. 2d. 728, (Fla. 1991). The court found that there had been insufficient evidence to show substantial compliance with H.R.S. maintenance procedures because, unlike below, there was no evidence regarding the rules generally, maintenance, registration, calibration or performance of the machine. Id., 650. In approving the decision the supreme court held:

> [T]here must be probative evidence (1) that a breathalyzer test was performed substantially in accordance with methods approved by HRS, and with a type of machine approved by HRS, by a person trained and qualified to conduct it and (2) that the machine itself has been calibrated, tested, and inspected in accordance with HRS regulations to assure its accuracy before the results of a breathalyzer test may be introduced.

Because the defendants below attacked the sufficiency of the rules themselves, the evidence introduced at the hearing was directed at the rules rather than at compliance with those rules. As a result, we go full circle. To attack the rules themselves, the administrative procedures must be employed. That is, in this case the Petitioner could have properly alleged before the county court a lack of substantial compliance with the rules of H.R.S., but they could not properly challenge the rules themselves.

A case remarkably similar to the instant case is State v. Woods, 37 Fla.Supp.2d 38 (Fla. 7th Cir. Ct. 1989), cert. denied Woods, et al. v. State, case no. 90-75 (Fla. 5th DCA May 8, 1991). The county court had held that the H.R.S. rules "[do not now assure that the chemical breath test instrument's results are reliable scientific evidence" because the rules did not require the police agencies to maintain detailed record keeping regarding the breath machines. Fla.Supp.2d 39. As is the situation in the instant case.

> A review of the record below reveals that the defendants did not introduce evidence of any non-compliance (substantial) or otherwise) by the local agency with any of the current HRS rules nor did they introduce any evidence of the inaccuracy in their breath tests results.
>
> Id., 40.

The above passage is indicative of the primary flaw of the county court's analysis on the merits. There was no testimony

presented by the Petitioner to show that the breath test machines rendered invalid results. To the contrary, the decision of the county court below was based entirely upon the determination that the H.R.S. rules establishing the procedures and standards for the monthly and annual checks were insufficient.

The county court below erred in this regard because defendants are not permitted to initially attack in the courts the validity of the rules themselves. Unlike the cases above, which involved resolution of factual issues as they related to compliance with the rules, the county court below determined as a matter of law that the rules themselves were facially insufficient. Furthermore, the mere fact that H.R.S. may not have taken all appropriate steps in enacting its rules and regulations does not *ipso facto* render the rules invalid. The affect of the challenged rules on the instant Petitioner defendants cannot be determined by the instant record because there was no evidence introduced below that suggests that the test results were inaccurate.

Stated succinctly, while the county court below could have entertained a challenge to the admissibility of breath test results based upon noncompliance with the rules, it erred in deciding as a matter of law that the H.R.S. rules were insufficient. The second certified question, if addressed at all in face of the lack of jurisdiction of the county court below and the failure of the Petitioenr to exhaust administrative remedies, should be answered negatively because there was no

evidence introduced below showing noncompliance with the rules or that the results achieved in those cases were inaccurate as a result.

Regardless of the existence or sufficiency of HRS rules for accuracy and reliability of annual and monthly maintenance checks, the new HRS rules (effective in August, 1991) are fully applicable to evidence secured prior to their enactment. Drury v. Harding, 443 So.2d 360 (Fla. 1st DCA 1983); affirmed on other grounds, 461 So.2d 104 (Fla. 1984); State v. Fardelman, 453 So.2d 1183 (Fla. 5th DCA 1984). Thus, even if this Court were to agree with the district court, the State would still be entitled to introduce the test results upon a showing of compliance with the new rules thus rendering moot this entire appeal.

ISSUE III

WHEN A DEFENDANT CONSENTS TO AN APPROVED CHEMICAL TEST, BUT IS GIVEN A NON-APPROVED TEST, MAY THE STATE INTRODUCE EVIDENCE OF THE NON-APPROVED TEST BY ESTABLISHING THE TRADITIONAL PREDICATE FOR THE INTRODUCTION INTO EVIDENCE OF SCIENTIFIC EVIDENCE?

The district court declined to answer their third certified question inasmuch as their answer to the previous questions completely disposed of the case. Thus, it is suggested that this Honorable Court is without jurisdiction to pass upon issues not considered, although certified by, the Second District. However, for the sake of argument should this Court decided to consider this issue, Respondent offers the following.

Respondent takes issue with the trial courts conclusion that the lack or sufficiency of HRS rules governing annual or monthly maintenance checks renders the Intoxilyzer 5000 an "un-approved" instrument. Indeed, Section 316.1932(1)(f)(1) provides:

> The tests determining the weight of alcohol in the defendant's blood shall be administered ... substantially in accordance with rules and regulations which shall have been adopted by the Department of Health and Rehabilitative Services. Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the Department of Health and Rehabilitative Services for reliability of result and facility of administration, and shall provide an approved method of administration which shall be followed in all such tests given under this section.

The statutes require the rules to contain only two things: (1) a method of administering the tests; (2) the tests which are approved. There is nothing in the statute saying anything about monthly or annual checks for accuracy or reproducibility. The agency has done precisely what the legislature directed as explained in more detail hereafter.

Moreover, Section 10D-42.022 of the HRS rules supplies all the components necessary for the "approval" of an Intoxilyzer 5000. Surely Petitioner below did not challenge the sufficiency of the rules as they apply to initial approval. Indeed, Petitioner looked to the procedures as set forth in .022 as the model upon which annual and monthly checks should be performed. Nowhere in 316.1932 did the legislature indicate that approval of a breath testing instrument is dependant upon the adequacy of rules promulgated for annual or monthly maintenance checks. Thus, it is patently erroneous for the trial court to have concluded that Petitioner was administered a non-approved breath test.

Be that as it may, it has long been established that results of tests given for the detection and qualification of alcohol in a defendant's blood stream are admissible quite apart from specific statues relating to admissibility. In Pardo v. State, 429 So.2d 1313 (Fla. 5th DCA 1983), the court recognized that:

> . . . the ability of consumed alcohol to impair normal human facilities is an accepted fact and that the reliability of certain chemical testing of blood is scientifically well established and, therefore, the result

> of such test, when relevant, is, under general law, admissible in evidence.

No valid distinction can be made between blood testing techniques and those used for the testing of breath. In California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the High Court gave its blessing to the inherent accuracy of an Intoxilyzer that was used in California. Thereto, the instrument had met national accuracy and reliability standards as does the instrument that is the subject of this appeal. Accordingly, the statutes should not be read to constitute a "limitation on the admissibility of any competent evidence that would otherwise be admissible in any civil or criminal case in the absence of those statutes." Pardo, at 1315.

This Court has already provided an answer to this question in State v. Lendway, 519 So.2d 725 (Fla. 1988) (and other cases cited in support therein). Though Lendway was written in the context of blood sample testing, as described above, such is equally applicable to breath testing. Thus, where the administrative rules have not been complied with (just as heinous, no doubt, as a lack of rules) the test results are still admissible if the State can establish the "traditional predicates for admissibility" of scientific evidence.

The traditional test of admissibility of scientific evidence employed by the courts is based upon the test structured by the Court in Frye v. United States, 293 F.2d 1013, 1014 (D.C. Cir. 1923), although the Supreme Court of Florida has never actually

mentioned Frye by name in adopting the structure. See Graham, Handbook of Florida Evidence, §704.2, n.9 (1987) and cases cited. In the case of State v. Bender, 382 So.2d 697 (Fla. 1980), this Court recognized the test to be applied in cases involving intoxilyzer results. In Bender, the Court stated that the results of blood alcohol tests are admissible without compliance with HRS rules if "the traditional predicate is laid, which establishes the reliability of the test, the qualifications of the operator, and the meaning of the test's results by expert testimony." Id. at 700. See also Stevens v. State, 419 So.2d 1058 (Fla. 1982) (court should admit scientific tests and experiments only when reliability of results widely recognized).

Since the supreme court's decision in Bender, other Florida courts have allowed for the admission of blood alcohol analysis where there was a failure to comply with HRS regulations, finding that the State could still use the results as evidence while losing the benefit of statutory presumptions. See State v. Walther, 519 So.2d 1731 (Fla. 1st DCA 1988); State v. Lendway, 519 So.2d 725 (Fla. 2d DCA 1988). Both Lendway and Walther, however, involved DUI manslaughter prosecutions where medical blood draws were performed, thereby ignoring Florida's implied consent statutes.

Further, in Correll v. State, 523 So.2d 562 (Fla. 1988), the supreme court stated, "that because the test employed here had previously been utilized in criminal trials, there was nothing to suggest to the prosecutor the need to assemble experts to

demonstrate the scientific validity of the method," citing State v. Harris, 152 Ariz. 150, 730 P.2d 859 (Ct App. 1986). The court held that "when scientific evidence is to be offered which is of the same type that has already been received in a substantial number of Florida cases, any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed." Correll at 567. cf. Quinn v. State, 549 So.2d 208 (Fla. 2d DCA 1989) (abuse of discretion to reject proffered testimony of defendant's expert, which would prove basis for jury to possibly find defendant's BAL below statutory minimum).

The Supreme Court of Florida again addressed the admissibility of blood draws where HRS regulations were not met in State v. Strong, 504 So.2d 758 (Fla. 1987). The Strong court echoed the reasoning of the Bender court, and recognized that the implied consent scheme was meant to protect drivers required to give blood samples. Id. at 759. However, the Strong court also noted that compliance with the implied consent scheme merely served to relieve the State of establishing the traditional scientific predicate. Id.

From Bender to Strong, it appears the courts would remain unwavering in refusing to extend application of the traditional predicate to cases where implied consent is implicated. Subsequent to Strong, however, the Second District Court of

Appeal extended the applicability of the traditional predicate to a case where implied consent was at issue. In State v. Quartararo, 522 So.2d 42 (Fla. 2d DCA 1988), the court was confronted with a blood draw taken at the request of a law enforcement officer, thereby implicating implied consent. Although the blood draw did not comply with Florida Statutes, §§316.1933, the Quartararo court allowed for the admissibility of the blood test's results upon establishment of traditional scientific predicates. Id at 44. The Quartararo court expressly stated: "[W]e do not believe that the legislature intended Section 316.1933 to have the effect of an exclusionary rule requiring suppression of evidence which has been constitutionally obtained by the State." Id. The Fifth District Court of Appeal affirmed a trial court's admission of a blood alcohol test in a case involving a legal blood draw, and in doing so cited Quartararo. Robertson v. State, 569 So.2d 861 (Fla. 5th DCA 1990) Approved, 604 So. 2d 783 (Fla. 1992).

Of greater significance is this clear finding in Drury v. Harding, 461 So.2d 104 (Fla. 1984).

> At the time that Chapter 82-155 took effect on July 1, 1982 the Florida Administrative Code contained existing HRS rules regarding blood alcohol testing. Fla. Admin. Code Rule 10D-42 et.seq. These rules contained detailed and comprehensive instructions for the operation and maintenance of chemical test instruments and were sufficient by themselves to provide for the production of reliable evidence of alcohol content while protecting the health and safety of the public. (emphasis added).

Drury at 107. The rules have not changed to any great degree since 1982. Accordingly, the decision of this Court in Drury effectively disposes of the question of whether the rules are sufficient to substitute for the traditional predicate of reliability.

In addition to recognizing the safeguards provided for drivers under Florida's implied consent law, this court in Bender also stated that the overall purpose of Florida's implied consent law "is to address the problem of drunk drivers on our public roadways and to assist in implementing Section 316.193 which provides that driving while intoxicated is unlawful." State v. Bender, 382 So.2d 697, 699 (Fla. 1980). Accordingly, the recent decisions of the Florida courts, specifically Quartararo and Robertson, have enunciated results that reflect the overall purpose of the statutory scheme, as opposed to the purpose of those few sections which provide for compliance with HRS testing techniques. See Bender, 382 So.2d at 699.

Based on the foregoing, no convoluted leap of legal logic could ever jump from the premiss that because the rules fail to meet the requirements of 316.1932 the results of the breath test are inaccurate. It is not the perceived inadequacy of the rules that violate Petitioner's right to a fair trial but the erroneous introduction of inaccurate results that gives rise to a constitutional infirmity. Failure of the rules to allow for truncated predicates for admissibility does not mean that the Intoxilyzer results can NEVER be proved accurate. Accordingly,

no conceptually sound reason exists for the total exclusion of Petitioner's Intozilyzer tests.

ISSUE IV

WHETHER THE DISTRICT COURT ERRED BY DETERMINING THE EXISTING HRS RULES SUFFICIENTLY MET SECTION 316.1932, FLORIDA STATUTES' MANDATE TO PROMULGATE RULES TO ENSURE THE RELIABILITY OF THE RESULTS OBTAINED FROM INTOXILYZER 5000 BREATH TEST RESULTS?

Though the Petitioenr's Motion to Suppress (or Motion in Limine) mentions the constitutional concept of "void for vagueness" (R. 217) such was not specifically argued before the trial court. Moreover, the county court's order did not rely on traditional concepts of void for vagueness. Rather, the court simply found that HRS has failed to comply with the directives of 316.1932(1)(f)1 by not promulgating rules defining accuracy and reliability for annual and monthly inspections. As a corollary thereto, the court found that a duly promulgate rule for annual and monthly tests would ensure the Intoxilyzer 5000's accuracy and reliability. Thus, the trial court did not find the existing rules to be vague. Rather, the court found them to be in violation of the enabling legislation of 316.1932 because they were insufficient to meet "reliability of result" as required thereunder. The trial court's reasoning, was found faulty by the Second District.

In the very first instance, and as previously noted above, absolutely nowhere in the three tier scheme of statutes governing DUI and tests to determine the alcohol content of a driver's blood is there any requirement that HRS conduct annual or monthly

inspections of the Intoxilyzer 5000 breath testing instrument. Ergo, any argument that the HRS rules do not meet the statutory mandate must end right here.

Nonetheless, HRS, in an effort to ensure precision, accuracy and reliability have, by their own internal operating rules promulgated after a public hearing, provided for monthly maintenance checks under 10D-42.024(11)(d) (1986). In addition, running logs of all tests administered to DUI suspects are kept for inspection. 10D-42.024(132)(a,b) (1986). 10D-42.024(d) and (e) (1986) further provide that the running logs shall be inspected monthly by a technician in order to ensure that proper records are maintained and that HRS can appoint individuals to "ascertain that the aforementioned rule and procedures are being adhered to by the individual agencies conducting chemical analysis of breath under Chapter 316 and 327, Florida Statutes". The rules also contain educational criteria for breath test technicians and for the instructors who train them. 10D-42.025 thru .027. Bernard Justice, the expert who testified in the trial court is an instructor. (R. 10) Moreover, the HRS appointed inspectors meet with scientific personnel and the scientific director in order to work out scientifically acceptable measures for testing the accuracy, precision, and reliability of Intoxilyzer's throughout the State. Thus, it is HRS's group of specially trained and scientifically oriented individuals who have worked out testing procedures <u>in excess</u> of what 316.1932 mandates in order to ensure accuracy and reliability. Form 1514 was promulgated and is used

in order to carry out the testing procedures envisioned by the scientific personnel.

10D-42.022 (1986) defines "precision" and "accuracy" and, by delineating the number of tests to be performed, "reliability". With such standards in mind, the HRS inspectors and scientific personnel came up with a relatively standardized method for testing accuracy and reliability on an annual and monthly basis. Form 1514 merely helps the inspectors and maintenance technicians implement the rules. Thus, the question becomes whether the lack of specific rules governing all the aspects of breath testing that Petitioner would like addressed means that HRS has failed to meet 316.1932 standards for "reliability of result".

The answer cannot be "yes". The HRS inspectors are not mere hacks who willy nilly apply whatever standards they see fit to their inspection methods. The legislature delegated to HRS the job of ensuring the accuracy of the instruments because the Department, rather than the legislature, is uniquely equipped to develop such techniques and procedures. Just as the 10D-42 rules do not specifically guide scientifically trained blood testing personnel in the minutest details of their testing methods, the rules need not be any more specific for annual or monthly checks. Professional individuals under Dr. Rrick such as Mr. Justice must pass certain educational and training criteria before assuming responsibilities as inspectors. Thus, like blood analysts, they are able to formulate scientifically sound methods for determining accuracy and reliability. Such methods are put to the test at

least 13 times a year as well as when the instrument performs its own self-diagnoses before each breath test. Thus, it can only be concluded that the HRS rules, together with the methods employed by the inspectors and other maintenance technicians, go far beyond the mandate of 316.1932.

Querry, why would only annual or monthly standards be necessary to ensure reliability of result? Why not weekly or daily checks? The answer, simply put, is that such checks cannot produce any more ironclad a guarantee of accuracy than existing regimens. Blood analysts do not undergo proficiency testing every month yet their methodology might differ substantially between individuals. Nonetheless, the results obtained between proficiency checks are not routinely suppressed due to a specific lack of rules governing periodic maintenance of the testing instruments. Herein, Intoxilyzers are tested by trained personnel in nothing short of a systematic fashion many times a year in excess of any standard announced in 316.1932. Thus, it cannot possibly be concluded, by any leap of constitutional logic, that the literally excessive testing methods employed by HRS do not fully comply with the legislative directives of 316.1932.

The Second District realized that <u>State v. Reisner</u>, 584 So. 2d 141 (Fla. 5th DCA 1991), <u>review denied</u>, 591 So. 2d 184 (Fla. 1991) was not really applicable to the instant case because this case came to the district court complete with expert testimony on the subject of the sufficiency of the HRS Rules. <u>Riesner</u> relied on the vagueness doctrine and a distinct lack of expert testimony

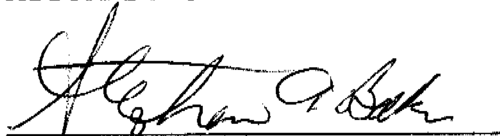
when it reached the conclusion that the rules do not sufficiently meet standards for accuracy and reproducibility. Such is not the case herein. Bernard Justice testified about the standards set by the rules and how professional people charged with their implementation have methodically set out to meet those standards. Whether they employ 1982 or 1986 Form 1514 is of little concern when Petitioner can point to nothing <u>inaccurate</u> about the existing testing methods. That the August 1991 HRS Rules substantially mirror the procedures testified to by Mr. Justice only indicates that the HRS methods were, all along, sufficient to guarantee accuracy, precision, reliability, reproducibility etc. Accordingly, the district court correctly concluded that "the entire administrative scheme sufficiently ensures the reliability of results even though it does not set forth specific standards with referencde to monthly and annual inspections". <u>State v. Berger</u>, 605 So. 2d 488, 491 (Fla. 2d DCA 1992).

CONCLUSION

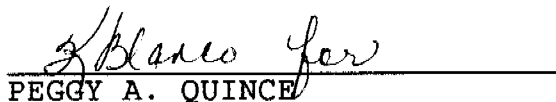
Based on the above and foregoing reasons, arguments and authorities, the lower Court's order suppressing the breath test must be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



STEPHEN A. BAKER
Assistant Attorney General
Florida Bar No. 0365645
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607-2366
(813) 873-4739

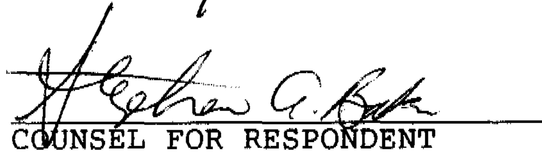


PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 0261041
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607

CO-COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Harrison, Attorney, 227 S. Nokomis Avenue, Venice, Florida 34285, Robert Westheimer, Attorney, 333 S. Tamiami Trail, Suite 288, Venice, Florida 34285, Donald Simon, Attorney, 2033 Main Street, Suite 401, Sarasota, Florida 34237, Michael Mosca, 100 Wallace Avenue, Suite 240, Sarasota, Florida 34237 this 1st day of March, 1993.



COUNSEL FOR RESPONDENT